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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

DONALD E. PERCY, et al.,

Petitioners,

v.

CAMEO CONVALESCENT CENTER, INC.,
DRAGOMIR KRESOVIC,
BORISLAV KRESOVIC,
LINDA HINTZ,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVEN CIRCUIT

PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX (Pp. 1-54)

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No. _____

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SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

1. Was denial to counties of the right to refer patients to the nursing home, without granting the nursing home the state-required prior hearing, a

deprivation without due process of law where there were adequate state remedies?

2. Was the trial court's failure to give a consipracy instruction harmless error in light of the jury findings of no deprivation by any actor?

3. Did fourteenth amendment due process entitle the corporate nursing home to a full adversary hearing, prior to denying counties the right to refer patients to the nursing home, where such denial did not otherwise prevent the nursing home from conducting its business and where notice and opportunity to be heard preceded the denial?

PARTIES TO THE PROCEEDINGS

Petitioners were officials and employes of the State of Wisconsin

Department of Health and Social Services. They are Donald Percy, Secretary of the Department and its chief executive officer; Robert Durkin, Administrator of the Department's Division of Health; Charles J. Fiss, Jr., Peggy Ann Smelser, Louis E. Remily, and Milton J. Stearns, managers in the Division's Bureau of Quality Compliance; David L. Siegel and Thomas G. Van de Grift, enforcement attorneys of the Department working in the Bureau; Darla C. Senn, Nancy Kacynski, Kathleen Rubin, and Janet Zanck, surveyors in the Bureau; and Fran Richards, supervisor of the surveyors.

Respondents are listed in the caption.

TABLE OF CONTENTS AND
TABLE OF AUTHORITES

QUESTIONS PRESENTED FOR REVIEW.....1

PARTIES TO THE PROCEEDINGS.....2

REPORTS OF DECISIONS UNDER REVIEW.....9

JURISDICTION.....9

RELEVANT STATUTORY PROVISIONS.....10

STATEMENT OF THE CASE.....10

ARGUMENT.....20

I. Denial To Counties Of The Right To Refer Patients To The Nursing Home, Without Granting The Nursing Home The State-Required Prior Hearing, Was Not A Deprivation Without Due Process Of Law Where There Were Adequate State Remedies....20

II. The Trial Court's Failure To Give A Conspiracy Instruction Was Harmless Error In Light Of The Jury Findings Of No Deprivation By Any Petitioner.....25

III. Fourteenth Amendment Due Process Did Not Entitle The Corporate Nursing Home To A Full Adversary Hearing, Prior To Denying Counties The Right To Refer Patients To The Nursing Home, Where Such Denial Did Not Otherwise Prevent The Nursing Home From Conducting Its Business And Where Notice And Opportunity To Be Heard Preceded The Denial.....32

CONCLUSION.....38

CASES CITED

Air East, Inc. v. National Transportation Safety Board,
512 F.2d 1227 (3rd Cir. 1975)...36

Birnbaum v. Trussell,
371 F.2d 672
(2nd Cir. 1966).....27

Cameo Convalescent Center, Inc. v. Senn,
738 F.2d 836 (7th Cir. 1984).....9

Davis v. Scherer,
104 S. Ct. 3012 (1984).....33

Dennis v. Sparks,
449 U.S. 24 (1980).....28

Fahey v. Mallonee,
332 U.S. 245 (1947).....36

Hanna v. Home Ins. Co.,
281 F.2d 298 (5th Cir. 1960), cert. denied, 365 U.S. 838 (1961).....27

Hodel v. Virginia Surface Min. & Reclam. Ass'n.,
452 U.S. 264 (1981).....36

Hoffman v. Halden,
268 F.2d 280 (9th Cir. 1959)....27

Hostrop v. Bd. of Jr. College Dist., No. 515,
523 F.2d 569 (7th Cir. 1975)....28

Hudson v. Palmer,
104 S. Ct. 3194
(1984).....21, 22, 24

Ibrahim v. Samore,
118 Wis. 2d 720,
348 N.W.2d 554 (1984).....25

Ingraham v. Wright,
430 U.S. 651 (1977).....22

Lewis v. Brautigam,
227 F.2d 124
(5th Cir. 1955).....27

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982).....23

Mathews v. Eldridge,
424 U.S. 319 (1976).....34, 38

Monell v. Department of Social Services,
436 U.S. 658 (1978).....26

Nesmith v. Alford,
318 F.2d 110 (5th Cir. 1963), cert. denied 375 U.S. 975 (1964),.....27

Northwestern Nat. Life Ins. Co. v. Riggs,
203 U.S. 243 (1906).....34

Olim v. Wakinekona,
103 S. Ct. 1741 (1983).....33

Parratt v. Taylor,
451 U.S. 527 (1981).....21

Paul v. Davis,
424 U.S. 693 (1976).....33

Phillips v. Trello,
502 F.2d 1000 (3rd Cir. 1974)...27

Rizzo v. Goode,
423 U.S. 362 (1976).....26

Shango v. Jurich,
681 F.2d 1091 (7th Cir. 1982)...33

Western Turf Asso. v. Greenberg,
204 U.S. 359 (1907).....34

Wisconsin v. Constantineau,
400 U.S. 433 (1971).....33, 37

WISCONSIN STATUTES

Sec. 50.03(11),
Wis. Stats. (1977).....24, 37

Sec. 50.04(4)(3),
Wis. Stats. (1977).....24

Sec. 50.04(4)(c)2,
Wis. Stats. (1977).....37

Sec. 50.04(4)(d),
Wis. Stats. (1977).....16, 23, 32

Sec. 50.04(4)(d)2,
Wis. Stats. (1977).....35

Sec. 50.04(4)(e),
Wis. Stats. (1977).....37

OTHER AUTHORITIES

28 U.S.C. sec. 1254(1).....9

28 U.S.C. sec. 1291.....12

28 U.S.C. sec. 1343(3).....11

42 U.S.C. sec. 1983.....10,11,12, 20,
.....26, 27, 29, 33

REPORTS OF DECISIONS UNDER REVIEW

The decision of the Court of Appeals is reported as Cameo Convalescent Center, Inc. v. Senn, 738 F.2d 836 (7th Cir. 1984), and set forth in the appendix ("A") at 3-51. Other record items have been lodged with the Court and are indicated by an "L."

JURISDICTION

The Court of Appeals' decision was made on June 29, 1984. Judgment was made and entered on the same date (A. at 1-2.) Respondents' petition for rehearing was denied on July 30, 1984 (A. at 52-54.)

This court has jurisdiction under 28 U.S.C. sec. 1254(1).

RELEVANT STATUTORY PROVISIONS

Title 42 U.S.C. sec. 1983:

> Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondents are a corporate for-profit nursing home, their

adminstrators and director of nursing. They commenced this action in December 1979 under 42 U.S.C. sec. 1983. The district court had jurisdiction under 28 U.S.C. sec. 1343(3). Pendent state claims were dismissed on February 8, 1982.

Trial to a jury was held in September and October 1982. The jury found petitioner Senn had engaged in a malicious prosecution and abuse of process against the corporate respondent. No other petitioner was found to have committed a wrong (A. 55-70). On October 8, 1982, the district court entered judgment dismissing all other petitioners, dismissing all respondents except the corporate nursing home, and awarding $65,000

compensatory and $10,000 punitive damages in favor of the corporate nursing home against petitioner Senn.

The Court of Appeals had jurisdiction under 28 U.S.C. sec. 1291. It affirmed in part, reversed in part, and remanded for a new trial. It affirmed the dismissal of the noncorporate respondents. (A. 40-42.) It reversed the judgment against Senn on the ground that a malicious prosecution and abuse of process are not actionable under 42 U.S.C. sec. 1983 absent an accompanying deprivation of a property or liberty interest. (A. 44-47.) It reversed the judgment in favor of the remaining petitioners on the ground that the trial court erred

in failing to give a conspiracy instruction, and ordered a new trial. (A. 18-30.)

The factual setting for the case begins in September of 1978. Petitioner Senn, a nurse surveyor for the State of Wisconsin Department of Health and Social Services, after conducting an on-site inspection, issued thirty-one notices of violation (NOVs) of Wisconsin nursing home law against respondent Cameo Convalescent Center, Inc. Petitioner Kacynski issued three NOVs against Cameo. Petitioners Rubin and Zanck issued NOVs against Cameo about a year later. Petitioners Van de Grift

and Siegel were Department attorneys who prepared and presented evidence in administrative hearings regarding the NOVs. The remaining petitioners were supervisors, managers, and others in the Department who had varying degrees of knowledge and involvement with the administrative case against Cameo. The administrative case was eventually settled.

Senn's September survey was an on-site inspection of the nursing home. At its conclusion, she met with nursing home representatives, who had brought their attorney to attend, to discuss her findings of violations. The following January, two other state inspectors made an on-site inspection to determine

whether the NOVs had been corrected. They found that all but seven of the NOVs had been corrected. Cameo representatives were part and parcel of the investigatory process, and several meetings were held with Department and Cameo representatives. (A. at 7-11, 46-47, 79-85, 100-03; L at 7-9.)

One of the statutory enforcement tools the Department was directed to use was the suspension of referrals list (SORL). If a nursing home was placed on the list, county social services agencies were forbidden to refer patients to it. Eligibility for the SORL was determined by the number of NOVs outstanding. Even if eligible for placement on the

SORL, however, a nursing home could not be placed on the list if it filed a timely appeal. Wis. Stats. (1977) sec. 50.04(4)(d) (A. at 112-14.)

In March 1979 petitioner Fiss advised Cameo that, because of the outstanding NOVs during the Senn survey which remained uncorrected after the second January 1979 on-site examination by two other investigators, Cameo would be placed on the SORL unless it timely exercised its appeal rights. (L at 1-3.)

Cameo did appeal, although not in the manner prescribed by Fiss' notice, and was given the benefit of doubt as to timeliness. (A. at 86-96.) At trial there was evidence tending to show that,

because of Cameo's departure from the prescribed procedure, its notice of appeal was mislaid until about April 12, 1979. (A. at 71-76, 86, 91-94.) In the meantime, Cameo's name was placed on the SORL dated April 4, 1979. (L. 4-6.) When the error was caught on April 12, a retraction and apology were issued the next day. (A. at 104-06.)

As to the surveyors who issued NOVs, the jury found that only petitioner Senn, and no other, prepared and prosecuted NOVs without probable cause; that she acted with malice in doing so; that she did so with an ulterior or improper motive; that she acted in a manner not authorized by the administrative process; and that

she did not enjoy prosecutorial or good faith immunity therefor. As to all petitioners, including Senn, the jury found that none of them committed any act in retaliation for Cameo's exercise of its rights to free speech or to petition the government for redress of grievances; that none of them were personally and directly responsible for placement of Cameo on the SORL and acted with intentional or reckless disregard of Cameo's appeal rights; and that none of them intentionally or recklessly denied a timely hearing on the NOVs and the imposition of a plan of correction. (A. 55-70.)

In reversing the judgment against Senn, the Court of Appeals held that neither a malicious

prosecution nor an abuse of process was actionable unless it resulted in a deprivation of a property or liberty interest. (A. 44-45.) It agreed with the district court that Senn's involvement had no connection with Cameo's placement on the SORL, the only conceivable "deprivation." (A. 45-47.)

In reversing the judgment in favor of the remaining petitioners, the Court of Appeals held that the district court should have given Cameo's proferred jury instruction on conspiracy. (A. 18-30.) Further, even though the jury found no petitioner had acted with intentional or reckless disregard of Cameo's appeal rights with respect to placement on the SORL, the Court of Appeals found error in

the instructions in that "recklessly" was defined within the definition of "intent." (A. at 35-36.) It found additional error in the trial court's failure to instruct the jury that Cameo had a due process right to a hearing prior to being placed on the SORL. (A. at 30-35.)

ARGUMENT

I. Denial To Counties Of The Right To Refer Patients To The Nursing Home, Without Granting The Nursing Home The State-Required Prior Hearing, Was Not A Deprivation Without Due Process Of Law Where There Were Adequate State Remedies.

The Court of Appeals held that Cameo had an actionable claim under 42 U.S.C. sec. 1983 because individual

State officials forbade counties from referring patients to Cameo without a prior hearing, even though state law required a prior hearing. By so holding, the Court of Appeals' decision directly conflicts with the rule of Hudson v. Palmer, 104 S. Ct. 3194 (1984), which was decided after the decision under review.

Hudson v. Palmer extended the rule of Parratt v. Taylor, 451 U.S. 527 (1981), to intentional deprivations. Parratt v. Taylor had held that the fourteenth amendment is not violated when a state employe negligently deprives an individual of property, provided that the State makes available a meaningful postdeprivation remedy. Hudson v. Palmer extended the rationale to intentional deprivations, "[f]or intentional, as for negligent

deprivations of property by state employees, the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy." Hudson v. Palmer, 104 S. Ct. at 3204 (footnote omitted).

Hudson v. Palmer is not limited to property deprivations. It includes liberty deprivations as well. This Court noted that its holding was "foreshadowed" by Ingraham v. Wright, 430 U.S. 651 (1977), a liberty interest case which this Court held was not actionable because of the availability of state remedies. Hudson v. Palmer, 104 S. Ct. at 3204 n. 14.

Consequently, it makes no difference whether Cameo was deprived of property or liberty. Neither deprivation is actionable if the State provided meaningful postdeprivation remedies.

Nor does it make a difference if, as Cameo alleges, the petitioners conspiratorially denied it a hearing before placing it on the suspension of referrals list. Wisconsin law required a prior hearing. Wis. Stats. (1977) sec. 50.04(4)(d). (A. at 112-13.) Petitioners' conduct, as alleged by Cameo, was random and unauthorized, contrary to the established state procedures. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982). The State action was not complete until and unless it provided or

refused to provide a suitable postdeprivation remedy. Hudson v. Palmer, 104 S. Ct. at 3204.

Wisconsin provided suitable postdeprivation remedies. First, administratively Cameo could ask for a hearing to "contest any department action" and obtain judicial review after hearing. Interim injunctive relief was available. Wis. Stats. (1977) secs. 50.03(11) and 50.04(4)(e). (A. at 107-08, 114-15.) In point of fact, the Department corrected the SORL error without request from Cameo. Petitioner Fiss instantly issued an apology and retraction to remove Cameo from the list (A. at 104-06), and it happened so fast Cameo knew of the apology and retraction before it knew of its placement on the list. (A. at 77.)

Second, sovereign immunity is no bar to damage suits against individual state officers. Officials can be sued individually either for the negligent performance of a ministerial duty or for conduct that is malicious, willful, and intentional. Ibrahim v. Samore, 118 Wis. 2d 720, 348 N.W.2d 554, 558 (1984).

II. The Trial Court's Failure To Give A Conspiracy Instruction Was Harmless Error In Light Of The Jury Findings Of No Deprivation By Any Petitioner.

The Court of Appeals required a conspiracy instruction despite the jury's finding that no petitioner did any act of retaliation or otherwise wrongfully caused Cameo to be placed on the SORL.

It is basic to sec. 1983 law that liability is direct and personal, not vicarious. Monell v. Department of Social Services, 436 U.S. 658, 694 (1978); Rizzo v. Goode, 423 U.S. 362, 376 (1976). Under 42 U.S.C. sec. 1983, by its own terms, a person is liable to another if he or she "subjects, or causes [the other] to be subjected" to a deprivation. Conspiracy law, as a tool to impose liability for the act of another, clashes with the requirement of direct and personal responsibility for subjecting the other to a deprivation. In no event can a conspiracy to injure upset a verdict that no actor caused injury.

The circuits are not in entire harmony as to the role a conspiracy may

play in a sec. 1983 action. Two circuits suggest that the conspiracy itself is actionable. See Phillips v. Trello, 502 F.2d 1000, 1004 (3rd Cir. 1974), and Birnbaum v. Trussell, 371 F.2d 672, 676 (2nd Cir. 1966). Two other circuits, however, hold that conspiracy itself is not actionable but that, if the conspiracy proximately causes a deprivation resulting in actual damages, it may serve to impose liability on the participants, even those who did not perform the damaging act. See Hoffman v. Halden, 268 F.2d 280, 294 (9th Cir. 1959); Nesmith v. Alford, 318 F.2d 110, 859 (5th Cir. 1963), cert. denied, 375 U.S. 975 (1964); Hanna v. Home Ins. Co., 281 F.2d 298, 303 (5th Cir. 1960), cert. denied, 365 U.S. 838 (1961); Lewis v. Brautigam, 227 F.2d 124, 128 (5th Cir. 1955). The

Seventh Circuit specifically aligned itself with the Fifth Circuit view, holding that "it is the acts causing damage to the plaintiff that give rise to liability for damages, not the conspiracy itself." Hostrop v. Bd. of Jr. College Dist., No. 515, 523 F.2d 569, 576 (7th Cir. 1975).

Moreover, this Court effectively has adopted the rule in the fifth, seventh, and ninth circuits. In Dennis v. Sparks, 449 U.S. 24, 27-28 (1980), in upholding a conspiracy allegation involving a state judge and a private party, this Court noted that the judge's official act "was the product" of the conspiracy.

Thus, this Court should grant certiorari to review this question for two reasons. First, the Court of Appeals neglected to follow its own as

well as this Court's rule that a conspiracy without an otherwise actionable wrong has no role in a sec. 1983 action. Second, there is conflict between the circuits as to the precise role conspiracy plays in a sec. 1983 action, with the second and third circuits saying it is independently actionable and the fifth, seventh, and ninth circuits saying it only imposes liability on participants to actions that result in a deprivation.

Had the Court of Appeals applied its own and this Court's rule correctly, the district court's failure to give the conspiracy instruction was harmless. For no petitioner subjected Cameo to any legal injury. The jury found that no petitioner acted to retaliate for first

amendment activity; that no petitioner was personally and directly responsible for placement of Cameo on the SORL and acted with intentional or reckless disregard of its appeal rights; and that no petitioner denied a timely hearing on the NOVs or the plan of correction. Further, except as to petitioner Senn, the jury found that no petitioner prepared and prosecuted an NOV without probable cause; that no petitioner acted with malice or with an ulterior or improper motive in doing so; and that no petitioner acted in a manner not authorized by the administrative process. (A. at 55-70.) And as to Senn, the jury, the district court, and the Court of Appeals (A. 45-47) agreed that nothing she did proximately caused Cameo's placement on the SORL.

Should this Court grant review on this question, a subissue is the Court of Appeals' holding that the trial court did not correctly instruct the jury on reckless disregard in respect to placement on the SORL. Since the jury found that no petitioner acted to retaliate and that no petitioner (except for Senn) departed from authorized administrative procedure, both the reckless disregard and conspiracy issues are red-herrings. (So does the exception for Senn since she had no causal relationship to the SORL error.) In any event, the importance of resolving the conspiracy question should not deter disposing of the reckless disregard subissue.

Consequently, the absence of a personal involvement in conduct resulting in a deprivation makes harmless any error in failing to give the conspiracy instruction.

III. Fourteenth Amendment Due Process Did Not Entitle The Corporate Nursing Home To A Full Adversary Hearing, Prior To Denying Counties The Right To Refer Patients To The Nursing Home, Where Such Denial Did Not Otherwise Prevent The Nursing Home From Conducting Its Business And Where Notice And Opportunity To Be Heard Preceded The Denial.

State law imposed a prior, full adversary hearing requirement for placement on the SORL upon receipt of a timely appeal. Wis. Stats. (1977) sec. 50.04(4)(d). (A. 113.) But the fact that a state's own procedural rules are

violated is not convertible into a due process claim actionable under 42 U.S.C. sec. 1983. Olim v. Wakinekona, 103 S. Ct. 1741, 1748 (1983); Shango v. Jurich, 681 F.2d 1091, 1100-01 (7th Cir. 1982). Accord, Davis v. Scherer, 104 S. Ct. 3012, 3020 (1984) (defense of qualified immunity not lost for failure to follow state rules).

The Court of Appeals, apparently recognizing that state law hearing requirements could not generate a due process hearing requirement, relied on Wisconsin v. Constantineau, 400 U.S. 433 (1971), and Paul v. Davis, 424 U.S. 693 (1976), to conclude that placement on the SORL injured Cameo's reputation and served to alter its legal status by forbidding county referrals. (A. at 30-32.)

If the Court of Appeals meant that a corporation has a liberty interest protectible by due process, it acted directly contrary to the holdings of this Court. Western Turf Asso. v. Greenberg, 204 U.S. 359, 363 (1907); Northwestern Nat. Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906).

Further, if it meant to say that placement on the SORL affected some other corporate interests protected from deprivation without due process, the Court of Appeals wholly failed to analyze the competing interests as required by Mathews v. Eldridge, 424 U.S. 319 (1976), to determine whether a predepivation hearing was required and whether the notice and opportunity here were sufficient. Those relevant factors

are the private interest involved, the risk of an erroneous deprivation, and the government's interest.

Application of these criteria here would show that Wisconsin's provision for a prior, full adversary hearing for placement on the SORL is gratuitous, not constitutionally required. Placement on the SORL did not require Cameo to cease doing business: it only forbade county agencies from making referrals. Wis. Stats. (1977) sec. 50.04(4)(d)2. (A. 113.) Thus, the private interest affected was minimal. Second, the risk of erroneous deprivation is minimal because the NOVs and the follow-up verification vist were on-site inspections by three different inspectors at two different times. (A. at 7-11, 46-47, 79-85, 100-03; L. at 7-9.) Third, the government's

interest was the protection of the life and safety of aged and infirm nursing home residents of a private for-profit corporation. Such interests justify swift action without prior hearing. Cf. Hodel v. Virginia Surface Min. & Reclam. Ass'n., 452 U.S. 264, 298-300 (1981) (mining); Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947) (savings and loan); and Air East, Inc. v. National Transportation Safety Board, 512 F.2d 1227, 1231-32 (3rd Cir. 1975) (air transportation). Cameo was eligible for placement on the SORL because it had five or more violations, some of which were "class B" violations. (L. at 1-3.) Those violations are defined as creating a condition or occurrence "directly threatening to the health,

safety or welfare of a resident." Wis. Stats. (1977) sec. 50.04(4)(c)2. (A. at 111-12.)

Moreover, the Court of Appeals neglected to consider the availability of postdeprivation administrative proceedings and judicial review. Wis. Stats. (1977) secs. 50.03(11) and 50.04(4)(e). (A. at 107-08, 114-15.) Instead, it relied on Wisconsin v. Constantineau, which involved the total absence of a state remedial mechanism.

Finally, the Court of Appeals failed to consider the sufficiency of the prior process that was provided. It consisted in the original on-site inspection by Senn, the subsequent on-site inspection by two other surveyors, the involvement of Cameo at all stages, Cameo's inclusion of an attorney in the initial exit interview, and the numerous

meetings between the Department and Cameo prior to placement. (A. at 7-11, 46-47, 79-85, 100-03; L. at 7-9.) This Court's rule is that ordinarily something less than a full evidentiary hearing suffices to warrant administrative action. Mathews v. Eldridge, 429 U.S. 319, 343 (1976). The Court of Appeals gave no justification for departing from this norm.

These departures from established rulings of this Court warrant review.

CONCLUSION

Petitioners respectfully pray that the Court issue its writ of certiorari

to the Court of Appeals for the Seventh Circuit.

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Appendix

TABLE OF CONTENTS

Judgment, United States Court of Appeals for the Seventh Circuit, June 29, 1984.....1

Opinion, United States Court of Appeals for the Seventh Circuit, June 29, 1984.....3

Order on rehearing, United States Court of Appeals for the Seventh Circuit, June 30, 1984.....52

Special Verdict, United States District Court for the Western District of Wisconsin, September 23, 1982.....55

Trial Testimony of Nadene Dreher, September 16, 1982.....71

Trial Testimony of Borislav Kresovic, September 14, 1982.....77

Trial Testimony of Jane Preston, September 16, 1982.....78

Trial Testimony of Thomas Van de Grift, September 17, 1982.....86

Trial Testimony of Dragomir Kresovic, September 15, 1982.....100

Letter of April 13, 1979,
Charles J. Fiss, Jr. to
All County Service Agencies,
51.42 and 51.437 Boards and
other interested parties.....104

Letter of April 13, 1979,
Charles J. Fiss, Jr.
to Dragomir Kresovic.....105

Sections 50.03(11)(a) and (b);
50.04(3) and (4), Wis. Stats.
(1977).....107

Opinion by Judge Grant

JUDGMENT - ORAL ARGUMENT

For the Seventh Circuit

Chicago, Illinois 60604

June 29, 1984

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. HARLINGTON WOOD, JR.,
Circuit Judge

Hon. ROBERT A. GRANT,
Senior District Judge*

(Formal parts omitted.)

This cause was heard on the record from the United States District Court

for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED in part, REVERSED and REMANDED in part, in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

BEST AVAILABLE COPY

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 83-1034
CAMEO CONVALESCENT CENTER, INC., et al.,

Plaintiffs-Appellees,

v.

DARLA C. SENN,

Defendant-Appellant.

No. 83-1048
CAMEO CONVALESCENT CENTER, INC., DRAGOMIR KRESOVIC, BORISLAV KRESOVIC, LINDA HINTZ,

Plaintiffs-Appellants,

v.

DONALD E. PERCY, et al.,

Defendants-Appellees.

(Caption continued
on following page)

No. 83-1545
CAMEO CONVALESCENT CENTER, INC.,

Plaintiff-Appellant,

v.

DARLA C. SENN, et al.,

Defendants-Appellees.

No. 83-1672
CAMEO CONVALESCENT CENTER, INC., et al.,

Plaintiffs-Appellees,

v.

DARLA C. SENN,

Defendant-Appellant.

Appeals from the United States
District Court for the Western
District of Wisconsin
No. 79-C-570
John C. Shabaz, Judge.

ARGUED NOVEMBER 28, 1983-DECIDED
JUNE 29, 1984

Before Cummings, Chief Judge, Wood, Circuit Judge, and Grant, Senior District Judge.*

Grant, Senior District Judge. Plaintiff-Appellants, Cameo Convalescent Center, Inc. (Cameo), and three of its officers and directors brought this action under 42 U.S.C. § 1983 alleging that the defendants, officers and employees of the Wisconsin Department of Health and Human Services (WDHHS), acted individually and in concert

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

to deprive the plaintiffs of constitutionally protected rights. For the reasons explained below, we affirm in part and reverse and remand in part for further proceedings consistent with this opinion.

Facts

Cameo Convalescent Center, Inc. (Cameo) is a closely held corporation in Milwaukee, Wisconsin, whose primary business is operating a licensed nursing home. Nursing homes are subject to extensive federal and state

regulation and in Wisconsin, the Wisconsin Department of Health and Human Services monitors the compliance of nursing homes with these federal and state regulations. This action arose by virtue of certain enforcement actions taken by the WDHHS.

On September 19, 1978, Darla Senn, a nurse-surveyor and employee of the WDHHS, served thirty-four notices of

violation (NOV) upon Cameo.[1] Thirty-one of the NOVs alleged deficiencies in Cameo's nursing program and three alleged deficiencies in Cameo's social services program. On October 17, 1978,

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[1] A notice of violation is a legal notice informing the nursing home that it is in violation of WDHHS regulations:

> (4) NOTICE OF VIOLATION; CORRECTION. (a) Notice of Violation; 1. If upon inspection or investigation the department determines that a nursing home is in violation of this subchapter or the rules promulgated thereunder, it shall promptly serve a notice of violation upon the licensee. Each notice of violation shall be prepared in writing and shall specify the nature of the violation, and the statutory provision or rule alleged to have been violated. The notice shall inform the licensee of the right to a hearing under par. (e)....

Wis. Stats. Ann. §50.04 (Supp. 1983).

the WDHHS imposed a plan of correction upon Cameo requiring that all the deficiencies noted by Senn be corrected within a day.[2] Despite a timely appeal of the NOVs and the plans of correction,

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[2] Upon the issuance of a NOV, the department would request a plan of correction from the nursing home explaining how the nursing home intended to remedy the deficiency. Upon Cameo's failure to submit plans of correction, the WDHHS imposed plans of correction upon Cameo. Ultimately, the WDHHS gave Cameo more time within which to comply with the plans of correction. See Wis. Stat. Ann. § 50.04(4)(c)(2) (Supp. 1983).

Cameo never received a hearing within the thirty-day period required under Wisconsin law.[3]

On October 26, 1978, Kacynski, a nurse-surveyor who had been with Senn when the thirty-four notices of violation were issued, and who was responsible for the issuance of the three social services NOVs, conducted a verification visit to determine if Cameo had complied with the plans of correction. Kacynski found that all three violations in the social services area had been corrected. On

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[3] Id. § 50.04(4)(e).

January 2, 1979, another verification visit was conducted. Of the thirty-one violations alleged by Senn, twenty-four were found to have been corrected, acceptable progress was found to have been made with respect to four, and only three remained uncorrected.

Cameo strongly opposed the issuance of the NOVs contending that they were without merit. Cameo suggested that the NOVs had been issued in retaliation for comments Cameo had made to Wisconsin government representatives concerning what Cameo alleged to be the poor quality and biased nature of the annual nursing home surveys which the WDHHS conducted. At trial, Cameo proffered evidence that Senn, shortly after issuing the 34 NOVs, told another nurse-surveyor "You know, I intend to screw them [Cameo]." Other evidence which

Cameo produced at trial showed that the WDHHS became increasingly aware that many of the NOVs issued by Senn were meritless, but the WDHHS continued to pursue them nonetheless.

On March 21, 1979, Cameo was notified that it was being placed on the WDHHS' Suspension of Referrals list.[4] The Suspension of Referrals list (SOR list) is compiled by the WDHHS and consists of nursing homes with a

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[4] Id. § 50.04(4)(d).

certain number of uncorrected violations.[5] The legal effect of

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[5] (d) Suspension of referrals. 1. The department shall prepare on a monthly basis a list containing the names and addresses of all nursing homes with existing class "A" violations as defined in par. (b) 1 or with 5 or more existing violations of any type, for which a plan of correction has not been timely submitted to the department under par. (c), for which a plan of correction has been disapproved or for which an approved plan of correction has not been carried out. A copy of the monthly list of violators shall be sent to each county welfare director and each s. 51.42 or 51.437 board director in the county in which each nursing home listed is located. The department shall notify each nursing home placed on the list of such placement at least 10 days prior to the issuance of the list. No nursing home may be placed on the list unless a hearing has been held under par. (e) and a final determination has been made by the department or the time for requesting a hearing has passed and no request has been made. A nursing home shall be removed from the list when all corrections are made or when a plan of correction for all deficiencies is approved by the department. The list shall indicate those nursing homes which have been removed from the list during the prior month.

placement upon the SOR list is to preclude state social service agencies and departments from referring nursing home patients to homes on the SOR list.[6] Wisconsin law provides that no nursing home may be placed on the SOR list unless it has been afforded the

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[6] Id. § 50.04(4)(d)(2).

opportunity for a hearing prior to its placement on the list.[7] Despite a timely appeal by Cameo, no hearing was ever held. Cameo's name appeared upon the April SOR list which was forwarded to over 600 social service departments and agencies.

Ultimately, the NOVs issued by Senn were the subject of a stipulated settlement between Cameo and the WDHHS. Plaintiffs filed the present action alleging that as a result of defendants' action, they suffered substantial and direct economic losses, loss of business reputation and deprivations of their constitutional rights under the first, ninth and fourteenth amendments of the Constitution. A bifurcated trial was

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[7] Id. § 50.04(4)(d).

held. Prior to the end of the liability phase of the trial, the district court dismissed the individual plaintiffs. At the conclusion of the liability phase of the trial, the jury found that nurse-surveyor Darla Senn had acted with malice in preparing and prosecuting the NOVs against Cameo, and that the NOVs were prepared and prosecuted against Cameo for ulterior or improper motives. No other defendant was found liable. The jury awarded Cameo compensatory damages of $65,000 and punitive damages of $10,000. Both Cameo and Senn appeal.

Cameo raises four issues on appeal:

I. Whether the district court erred in declining to present plaintiffs' conspiracy theory to the jury;

II. Whether the district court's due process instructions were erroneous;

III. Whether the district court erred in certain evidentiary rulings and in refusing to give a missing witness instruction;

IV. Whether the district court erred in dismissing the claims of the individual plaintiffs?

Darla Senn raises two issues for our consideration:

I. Whether the district court erred in entering a judgment of liability against Darla Senn based upon the special jury verdict;

II. Whether Darla Senn is entitled to absolute immunity under Butz v. Economou, 438 U.S. 478 (1978)?

I. Whether the district court erred in declining to present plaintiffs' conspiracy theory to the jury?

The main thrust of plaintiffs' case was that the defendants had acted in concert to deprive the plaintiffs of constitutionally protected rights. At trial, however, no conspiracy instruction or special verdict question on conspiracy was presented to the jury. Instead, the instructions focused on individual liability. Cameo contends that it was reversible error for the district court not to have instructed the jury on its conspiracy claim.

Where supported by sufficient evidence, a plaintiff is entitled to have the jury instructed by the Court on

the theory of his case. Hallberg v. Brasher, 679 F.2d 751, 757 (8th Cir. 1982); Alloy International Co. v. Hoover-NSK Bearing Company, Inc., 635 F.2d 1222, 1226 (7th Cir. 1980); Brandes v. Burbank, 613 F.2d 658, 668 (7th Cir. 1980); Don Burton, Inc. v. Aetna Life and Casualty Co., 575 F.2d 702, 706 (9th Cir. 1978) ("[A] litigant is entitled to have the jury charged concerning his theory of the case if there is any direct or circumstantial evidence to support it.") Indeed, the failure to give an instruction, where merited, effectively directs a verdict for the opposing party on the disputed issue. Id.

Where the issue of civil conspiracy is involved, courts must be particularly cautious. As this Court noted in Hampton v. Hanrahan:

> [T]he question whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can 'infer from the circumstances [that the alleged conspirators] had a meeting of the minds and thus reached an understanding' to achieve the conspiracy's objectives. Adickes v. Kress & Co., 398 U.S. 144, 158-59, 90 S. Ct. 1598, 1609, 26 L. Ed. 2d 142 (1970) .... When a plaintiff alleges a conspiracy to violate civil rights, '[t]he existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide.' Adickes, supra, 398 U.S. at 176, 90 S. Ct. at 1618 (Black J. concurring.)

600 F.2d 600, 621 (7th Cir. 1979); see also Putnam v. Gerloff, 701 F.2d 63, 65 (8th Cir. 1983).

In Hampton, we outlined the elements of civil conspiracy:

> A plaintiff seeking redress need not prove that each participant in a conspiracy knew the 'exact limits of the illegal plan or the identity of all participants therein.' Hoffman-LaRoche, Inc., supra, 447 F.2d at 875. An express agreement among all the conspirators is not a necessary element of a civil conspiracy. The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective or possess the same motives for desiring the intended conspiratorial result. To demonstrate the existence of a conspiratorial agreement, it simply must be shown that there was 'a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences.' Id.

600 F.2d at 621. We noted that "[a]bsent the testimony of a co-conspirator, it is unlikely that direct evidence of a conspiratorial agreement will exist." Id.

Applying the standards of Hampton to the present case, this Court believes that sufficient evidence was adduced at trial to merit a conspiracy instruction. Darla Senn prepared and prosecuted NOVs, most of which were meritless. Although the WDHHS became increasingly aware that many of the NOVs which Senn issued were meritless, they pursued them nonetheless. Despite a timely appeal upon notification that Cameo would be placed upon the SOR list, Cameo was placed on the April SOR

list which was forwarded to over 600 social service agencies and departments. Plaintiffs proffered adequate evidence to permit a jury to infer the existence of a conspiracy and to merit a jury instruction thereon.

Our determination that plaintiffs merited a conspiracy instruction does not end our inquiry. "[A]n error in refusing to give an instruction, like any other trial error, is subject to Rule 61, Fed. R. Civ. P. If it 'does not affect the substantial rights of the parties' we are to disregard it." Alloy International Co., 635 F.2d at 1226. Defendants rely upon Beard v. Mitchell, 604 F.2d 485, 497 (7th Cir. 1979) for the proposition that the district court's failure to instruct on plaintiffs' conspiracy theory did not

affect the plaintiffs' substantial rights.

In Beard, this Court held that a court's failure to instruct as requested will not constitute reversible error in three situations: where the requested instruction is given in substance; where a general instruction is given without the specific theory of the case being presented and the party's theory of the case is apparent throughout the course of the trial, and finally, where the requested instruction is unsupported by the evidence adduced at trial.

None of these exceptions apply to the facts presently before this

Court. The requested jury instruction was never given in substance--all the jury instructions and special verdict questions focused on individual liability, not conspiratorial liability. The second exception is likewise inapplicable. Although plaintiffs argued conspiracy during opening and closing arguments, no general instruction on conspiracy was ever provided. Arguments of counsel alone are not a substitute for proper jury instructions. Alloy International Co., 635 F.2d at 1226. Finally, as discussed previously, adequate evidence was adduced at trial to merit a conspiracy instruction.

Defendants' last argument is that the plaintiffs have waived jury instruction errors by failing to object. It is hornbook law that "... [n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection." Fed. R. Civ. P. 51. Although no stenographic transcript is available of the conference at which plaintiffs objected to the court's instructions, plaintiffs filed a statement under Fed. R. App. P. 10 preserving their objections to the district court's failure to give any of the instructions which plaintiff

requested.[8] This statement was served upon opposing counsel and approved

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[8] Federal Rule of Appellate Procedure 10(c) and (d) provides:

> (c) Statement of the Evidence or Proceedings When no Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

by the district court.[9] We find that this issue has been

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[9] In pertinent part, the statement provides:

> 5. That at that conference a number of the proposed instructions to be given were reviewed but none were agreed to; and the Court indicated it would formulate its own instructions based on instructions presented by the parties.
>
> 6. That at that conference and for the record it was understood that each of the parties were preserving their objections to the Court's failure to give any of the instructions previously offered by that party in the final instructions presented to the jury in this proceeding.

properly preserved for our consideration.[10]

Accordingly, for the reasons stated above, this Court finds that the

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[10] Plaintiffs suggest that the district court improperly restricted the presentation of their conspiracy case. At trial plaintiffs offered into evidence over three hundred exhibits, of which many were several pages long. Plaintiffs contend that the district court refused to allow any testimony about the exhibits other than foundation testimony. As a result of the district court's restrictions on plaintiffs' presentation of their exhibits, plaintiffs conclude that they were unable to fully present their case.

District courts have substantial discretion in controlling the mode and order of presenting evidence. Fed. R. Evid. 611; United States v. Ballard, 535 F.2d 400 (8th Cir.), cert. denied, 429 U.S. 918 (1976); United States v. Daniels, 528 F.2d 705 (6th Cir. 1976). Here plaintiffs had a full opportunity to discuss and explain the exhibits which were presented to the jury during closing arguments. The jury received an index to the exhibits introduced by plaintiffs. Accordingly, we find no abuse of discretion here.

district court erred in failing to instruct the jury on plaintiffs' conspiracy theory. Because the failure to instruct on plaintiffs' theory of the case constitutes reversible error on the facts of this case, we remand this case to the district court for a new trial which shall include instructions on plaintiffs' theory of the case.

II. Whether the district court's jury instructions on due process were erroneous?

It is axiomatic that a fundamental requirement for due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Armstrong v. Monzo, 380 U.S. 545, 552 (1965). "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity

to be heard are essential." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). However, mere injury to reputation, such as being placed on a blacklist, does not, without more, give rise to a cognizable due process claim under the fourteenth amendment. There must additionally be the deprivation of a "liberty" or "property" interest. Paul v. Davis, 424 U.S. 693 (1976). As the Supreme Court noted in Davis, "'[P]osting,' therefore, significantly altered her status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from defamation, justified the invocation of procedural safeguards." Id. at 708-709. Here, Cameo properly asserts a cognizable due process claim because Cameo's placement upon the SOR list without the requisite hearing not

only damaged Cameo's reputation but also altered Cameo's legal status. Cameo's placement upon the SOR list, like the individual placed on the list of known drunks in Davis, deprived Cameo of a right under state law: the right to receive referrals from state social service departments and agencies.

Wisconsin law specifically provides that a nursing home is entitled to a hearing prior to placement on the SOR list. Wis. Stat. Ann. § 50.04(4)(d). However, the district court instructions failed to inform the jury that Cameo was entitled to such hearing, but simply provided:

> Due process. To recover on their claim for violation of due process, the plaintiffs, Cameo Convalescent Center, must show by a preponderance of the evidence that a defendant or defendants were personally and directly responsible for placing Cameo on the suspension of referrals list and acted with

> intentional disregard of Cameo's right to appeal this placement. In the alternative, plaintiffs must show that Cameo was denied a timely hearing on the Notices of Violation and the imposition of a plan of correction.

Cameo argues that the district court's instructions on due process were erroneous in two respects: they failed to explain that Cameo was entitled to a hearing prior to its placement on the SOR list, and they failed to inform the jury that the deprivation of Cameo's due process rights could be accomplished by reckless as well as by intentional conduct.

Defendants state that there was no need to inform the jury that Cameo was entitled to a hearing prior to placement on the SOR list because it is undisputed that Cameo did not receive the hearing

to which they were entitled. Defendants argue that the only jury issue was one of legal responsibility, i.e., which, if any, of the defendants was responsible for Cameo's denial of due process.

We think that the jury instructions should have informed the jury that Cameo was entitled to a hearing prior to placement on the list. Although this issue was not disputed, the jury could not determine whether Cameo's due process rights were violated by the defendants unless it was aware that those rights included a hearing prior to placement on the SOR list. On remand, the jury instructions on due process must inform the jury of Cameo's right to a hearing prior to placement on the SOR list.

Cameo also argues that the due process jury instructions failed to inform the jury that Cameo's rights could be violated by reckless as well as by intentional conduct. While the district court's instructions stated that Cameo must prove that the defendants "acted with intentional disregard of Cameo's right to appeal" its placement on the SOR list, the trial judge included a definition of "recklessly" when he instructed the jury on the meaning of intent. Additionally, the special verdict questions inquire whether any of the defendants acted with intentional or reckless disregard of Cameo's rights. Nonetheless, there is a possibility that the jury was confused by the trial judge's "intentional disregard" due process instruction and his subsequent instructions on reckless

conduct. Accordingly, on remand, the trial judge will clearly instruct the jury that plaintiff's due process rights could be violated by intentional as well as by reckless conduct. See Richardson v. City of Indianapolis, 658 F.2d 494, 502 (7th Cir. 1981), cert. denied, 455 U.S. 945 (1982).

III. Whether the district court erred in certain evidentiary rulings and in refusing to give a missing witness instruction?

At trial, Cameo introduced substantial excerpts of deposition testimony of several party-defendants pursuant to Fed. R. Civ. P. 32. Pursuant to Fed. R. Civ. P. 32(a)(4), the defendants read other portions of the deposition introduced by Cameo. Cameo contends that a substantial portion of the deposition testimony

introduced by the defendants was inadmissible as irrelevant, prejudicial or hearsay.

When one party utilizes deposition testimony at trial, "an adverse party may require him to introduce any other part which ought in fairness ... be considered with the part introduced." Fed. R. Civ. P. 32(a)(4). This is the "rule of completeness" which prevents misleading impressions created by taking a statement out of context. 1 Weinstein, Weinstein's Evidence ¶ 106[02] (1982). Such deposition testimony, however, is admissible only in accordance with the rules of evidence. Fed. R. Civ. P. 32(a); Reeg v. Shaughnessy, 570 F.2d 309, 316-17 (10th Cir. 1978).

This Court has carefully reviewed the substantial deposition evidence

introduced by the defendants and finds no reversible error. While, on occasion, evidence which was otherwise inadmissible as irrelevant, prejudicial or hearsay was introduced, such error was harmless in the context of this lengthy jury trial and did not affect the plaintiffs' substantial rights. Inasmuch as this case is being remanded for a new trial, we are confident that the district court will insure on remand that deposition testimony used in accordance with Fed. R. Civ. P. 32(a)(4) is otherwise properly admissible under the Federal Rules of Evidence.

Plaintiffs further argued that the district court abused its discretion by failing to give a missing witness instruction with respect to several party-defendants who did not testify at trial. The determination of whether a

missing witness instruction should be given rests within the trial court's sound discretion. Labit v. Santa Fe Marine Inc., 526 F.2d 961 (9th Cir.), cert. denied, 429 U.S. 827 (1976). Two factors convince this Court that the trial court here did not abuse its discretion in refusing to give a missing witness instruction. First, Cameo relied upon and quoted extensively from the depositions of missing witnesses. As McCormick notes, the justification for the missing witness instruction diminishes with the availability of the tools of discovery. McCormick, McCormick on Evidence § 272 at 657 (2d ed. 1972). Second, and more importantly, plaintiffs commented extensively during closing arguments on the missing witnesses. For these

reasons, this Court finds that the district court did not abuse its discretion in refusing to give a missing witness instruction.

IV. Whether the district court erred in dismissing the claims of the individual plaintiffs?

Prior to the end of the liability phase of the trial, the district court dismissed the claims of the individual plaintiffs, stating that such plaintiffs lacked standing because they had failed to establish any injury from the actions of the defendants. The individual plaintiffs argue that the district court erred in dismissing their claims.

It is clear that under Paul v. Davis, 424 U.S. 693 (1976), the individual plaintiffs do not have a claim against the defendants unless they establish not only that the acts of one

or more of the defendants caused injury to their reputation but also that the individual plaintiffs were deprived of a constitutionally protected interest by alteration of legal status. Mere loss of reputation does not implicate any liberty or property interests sufficient to establish a claim under § 1983.

We agree with the district court that the individual plaintiffs have failed to establish claims cognizable under § 1983. The three exhibits which plaintiffs assert establish injury to their reputation fail to name the individual plaintiffs and cannot be reasonably construed to establish damage to the individual plaintiffs' reputations. Nor do the individual plaintiffs establish any alteration of legal status. They suggest that by virtue of the meritless NOVs, they were

subject to fines, forfeitures or loss of professional licenses under provisions of Wisconsin law. However, no evidence was offered to show that any fines or forfeitures were actually imposed or that any individual plaintiff actually lost his license. Finally, the individual plaintiffs suggest that the plans of correction imposed limitations on how they could pursue their chosen occupations. However, the plans of correction were imposed on Cameo, not the individual plaintiffs. Accordingly, we conclude that the individual plaintiffs were properly dismissed.

Issues Raised by Darla Senn

This Court now addresses the two issues which Darla Senn raises on appeal. The special verdict questions submitted by the district court asked

which of the defendants, if any, had prepared or prosecuted notices of violation against Cameo without probable cause or with malice; whether the notices of violation had been prepared or prosecuted for ulterior or improper motives, and if the defendants were entitled to good faith or prosecutorial immunity. The jury found that only Darla Senn had maliciously prepared and prosecuted notices of violation against Cameo, that she had done so for improper motives and that she was not entitled to good faith or prosecutorial immunity. After the damage phase of the trial was completed, the district court entered judgment against Senn for $75,000. Senn appeals, arguing that the district court erred in entering judgment against her,

and that she was entitled to absolute immunity under Butz v. Economou, 438 U.S. 478 (1978).

I. Whether the district court erred in entering a judgment of liability against Darla Senn based upon the special jury verdict?

Senn contends that the district court erred in entering judgment against her because the issuance of the meritless notices of violation constitutes the common law tort of malicious prosecution, not a claim cognizable under § 1983. Whether abuse of legal process or malicious prosecution rises to the level of a constitutional violation actionable under 42 U.S.C. § 1983 depends upon whether, "acting under color of state law, the defendant has subjected the plaintiff to a deprivation of

constitutional magnitude." Hampton v. Hanrahan, 600 F.2d at 630. However, "conduct which merely engenders common law tort liability, without infringing on constitutionally protected interests, is not a sufficient basis to support a cause of action under Section 1983." Beker Phosphate Corporation v. Muirhead, 581 F.2d 1187, 1189 (5th Cir. 1978). "[T]he common law tort of misuse of legal procedure, without more, does not rise to the level of Constitutional wrong remedied by Section 1983." Id. We conclude that the district court erred in entering judgment against Senn since we find that Senn did not subject Cameo to a deprivation of constitutional magnitude.

Cameo's § 1983 action arises from its placement upon the SOR list without the hearing to which it was entitled.

The nexus between the infringement upon Cameo's constitutionally protected rights and Darla Senn's issuance of the NOVs is simply too attenuated to permit this Court to hold that Senn subjected, or caused Cameo to be subjected, to the deprivation of due process.[11] Between the issuance of the NOVs in September 1978 and Cameo's placement upon the SOR list in April 1979, two further verification visits of Cameo were

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[11] This conclusion is clearly buttressed by the jury's reponse to special verdict question #14:

> Number 14: Which of the following defendants, if any, were personally and directly responsible for the placement of Cameo on the Suspension of Referrals List and acted with intentional or reckless regard of Cameo's right to appeal such placement? Answer: None.

conducted by the WDHHS, meetings were held among WDHHS officials concerning Cameo's notices of violation and most crucially, Cameo's timely appeal to its placement on the SOR list was mishandled, resulting in Cameo's placement on the SOR list. We conclude that although Senn's actions constituted abuse of process and malicious prosecution, they did not subject Cameo, or cause Cameo to be subjected, to its denial of due process, and Cameo may not proceed against Senn under Section 1983.

Having found that Cameo may not pursue its rights against Senn under Section 1983, this Court finds no need to address Senn's second issue: whether she is entitled to absolute immunity under Butz v. Economou, 438 U.S. 478 (1978).

Award of Attorneys' Fees to Plaintiff

One final issue--the calculation of attorneys' fees--remains for our consideration. Pursuant to 42 U.S.C. § 1988, plaintiffs originally sought fees of $144,230.75. After consideration of the guidelines which we set forth in Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976) and plaintiffs' limited success at trial, the district court awarded fees of $44,182. Plaintiffs contend that this award is an abuse of discretion.

It is axiomatic that only prevailing parties are entitled to fees under § 1988. Blum v. Stenson, ___ U.S. ___ (1984); 52 U.S.L.W. 4377 (March 21,

1984); Hensley v. Eckerhart, ____ U.S. ___, 103 S. Ct. 1933 (1983). A party is considered to be a prevailing party if he "succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Id. at 1939 citing Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978). At this stage of the litigation, it is impossible to term plaintiffs prevailing parties since, at best, all they have achieved is a new trial with proper jury instructions.

Accordingly, we set aside the district court's award of attorneys' fees, subject to reconsideration by the district court if plaintiffs prevail after a new trial. If fees are awarded, the district court shall allow compensation for reasonable law clerk and paralegal fees. Many courts have

recently construed attorneys' fees to include law clerk and paralegal expenses. Laffey v. Northwest Airlines, 572 F. Supp. 354 (D.D.C. 1983); Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983); Richardson v. Byrd, 709 F.2d 1016 (5th Cir. 1983); Berman v. Schweiker, 531 F. Supp. 1149, 1154 (N.D. Ill. 1982); Ross v. Saltmarsh, 521 F. Supp. 753, 769 (S.D.N.Y. 1981). We feel that the better rule is to allow compensation for law clerks as attorneys' fees under § 1988. Such a policy encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes.

Conclusion

For the reasons detailed above, we AFFIRM in part, REVERSE and REMAND in part for proceedings consistent with this opinion.

A true Copy:

Teste:

_____
Clerk of the United States
Court of Appeals for the
Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

July 30, 1984

Before

Hon. WALTER J. CUMMINGS,
Chief Judge
Hon. HARLINGTON WOOD, JR.,
Circuit Judge
Hon. ROBERT A. GRANT,
Senior Circuit Judge*

(Formal parts omitted)

ORDER

Presently before this court is plaintiff-appellee's Petition for Rehearing and/or in the Alternative for Clarification. The arguments raised in the Petition for Rehearing are the same raised before this Court during

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana is sitting by designation.

oral argument and addressed in the briefs of counsel. These arguments have been carefully considered by this Court and resolved in this Court's detailed opinion of June 29, 1984. Counsel for plaintiff-appellee are admonished that petitions for rehearing are not viewed with favor, particularly where they do no more that rehash old arguments.

The opinion in this case which issued on June 29, 1984, is, however, hereby AMENDED as follows:

On page 17, add footnote 12 to the end of the first full paragraph.

On page 17, insert footnote 12 at the base of the page following footnote 11. Footnote 12 reads as follows:

12/ This Court expreses no opinion whatsoever as to whether Darla Senn may be liable under § 1983 for conspiracy to violate civil rights.

IT IS ORDERED that the Petition for Rehearing be, and is hereby DENIED.

84-505

Office - Supreme Court, U.S.
FILED
SEP 26 1984
ALEXANDER L. STEVAS
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

DONALD PERCY, et al.,

Petitioners,

v.

CAMEO CONVALESCENT CENTER, INC.,
DRAGOMIR KRESOVIC,
BORISLAV KRESOVIC,
LINDA HINTZ,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

(Pp. 55-115)

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COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

CAMEO CONVALESCENT CENTER, INC., et al.,

Plaintiffs, SPECIAL VERDICT

79-C-570

v.

DONALD E. PERCY, et al.,

Defendants.

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1. Did any of the defendants prepare notices of violation or prosecute such notices against Cameo Convalescent Center without probable cause?

YES __X__ NO _____

If your answer is "yes", answer questions #2, #3 and #4. If your answer is "no", then skip to question #5.

2. Which of the following defendants, if any, acted with malice in preparing or prosecuting the notices of violation against Cameo Convalescent Center?

_____ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

__X__ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

3. Which defendants, if any, identified in question #2 as having acted with malice are entitled to good faith immunity as that term has been defined for you in the instructions?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

4. Which defendants, if any, identified in question #2 as having acted with malice are entitled to prosecutorial immunity as that term has been defined for you in the instructions?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

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5. Were the notices of violation prepared or prosecuted against Cameo due to an ulterior or improper motive?

YES __X__ NO _____

If your answer is "yes", answer questions #6, #7 and #8. If your answer is "no", skip to question #9.

6. Which of the defendants, if any, threatened or acted in a manner not authorized by the administrative process during the prosecution of these notices of violation?

_____ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

__X__ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

7. Which defendants, if any, identified in question #6 as having acted in a manner not authorized by the administrative process are entitled to good faith immunity as that term has been defined for you?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

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_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

8. Which defendants, if any, identified in question #6 as having acted in a manner not authorized by the administrative process are entitled to prosecutorial immunity as that term has been defined for you?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

9. Were any acts of any defendant motivated by retaliation for plaintiff's exercise of its rights to free speech or to petition the government for redress of grievances?

YES _____ NO __X__

If your answer is "yes", answer questions #10, #11, #12, and #13. If your answer is "no", skip to question #14.

10. Which defendants were so motivated?

_____ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

11. For each defendant identified in question #10 as possessing a retaliatory motive, would that defendant have taken the same actions in the absence of such motive?

DEFENDANTS	YES	NO
Donald Percy	___	___
Robert Durkin	___	___
Charles Fiss	___	___
Peggy Ann Smelser	___	___
Louis Remily	___	___
David Seigel	___	___
Thomas Van De Grift	___	___

Milton Stearns	___	___
Fran Richards	___	___
Darla Senn	___	___
Kathleen Rubin	___	___
Nancy Kacynski	___	___
Janet Zanck	___	___

12. Which defendants, if any, identified in question #10 as possessing a retaliatory motive and for whom you answered "no" in question #11, are entitled to good faith immunity as that term has been defined for you?

_____ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

13. Which defendants, if any, identified in question #10 as possessing a retaliatory motive and for whom you answered "no" in question #11 are entitled to prosecutorial immunity as that term has been defined for you?

_____ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

14. Which of the following defendants, if any, were personally and directly responsible for the placement of Cameo on the suspension of referrals list and acted with intentional or reckless disregard of Cameo's right to appeal such placement?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

15. In the event you find that Cameo was intentionally or recklessly denied a timely hearing on the notices of violation and the imposition of a plan of correction, which of the following defendants, if any, were personally and directly responsible for these acts?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

16. Which defendants, if any, identified in questions #14 or #15 are entitled to good faith immunity as that term has been defined for you in the instructions?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

17. Which defendants, if any, identified in questions #14 or #15 are entitled to prosecutorial immunity as that term has been defined for you in the instructions?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

Signed this 23rd day of September, 1982.

/s/_____

Foreperson

TESTIMONY OF NADENE DREHER

September 16, 1982

Direct Examination by Mr. Hesslink

Q Mrs. Dreher, where are you currently employed?

A For the State of Wisconsin, Division of Health, Bureau of Quality Compliance.

Q What is your current job title?

A Program Assistant 1.

Q Has that always been your title at the Bureau of Quality Compliance?

A No.

Q Do you work in the Madison office or one of the district offices?

A In the Madison office.

. . . .

Q During the period of March and April of 1979, was as best you can recall, were your duties, what were your duties and responsiblities?

A I was a receptionist for our area, our room answered telephone; we received the mail for our section and delivered it; would do some typing.

Q As part of your duties and responsibilities at that time, would you accept for and sign documents in pleadings which people would file with the Bureau of Quality Compliance?

A Yes.

Q Now, I show you a document which has been marked as Exhibit No. 111 and on that document in the lower

right-hand corner there is something which is written in green ink. Do you see that?

A Yes.

Q What does that say?

A Received, Bureau of Quality Compliance, Enforcement Section, Nadene R. Dreher, 3-30-'79.

Q Did you in fact, is that your handwriting?

A Yes it is.

Q And, is that your signature?

A Yes, it is.

Q What is the title of the document?

A Notice of Appeal Request for Fair Hearing and Petition for Declaratory Ruling.

. . . .

Q Did you also maintain a log or other tracking mechanism for when appeals were filed for the Suspension of Referrals List?

A I don't recall.

Q Do you recall whether or not you kept track of whether or not an appeal was filed for a notice which had been sent out?

A I don't recall.

Q Well, were you aware that there was such a log being maintained?

A Yes.

Q And, what is your best recollection of who it was who maintained that log?

A I really don't know.

. . . .

Q Do you ever recall indicating to anyone that there was a name of a facility on that list for which you had received an appeal?

A No.

Q Do you have specific recollection you did not indicate that to anyone?

A I don't have any recollection of mentioning it.

Q Do you know that you did not?

A No.

Q What would have been your normal practice with respect to appeals which you received?

A I would give them normally to the person indicated that they were for.

Q The attorney who was assigned to the case?

A If that is the person I was told to give it to, yes.

Q Was in fact the policy during that point in time to give those to the attorney who was assigned to the case?

A Yes.

Q And, do you have any specific recollection that you did not follow that policy with respect to this appeal?

A I have no recollection.

Q Are you aware that Dave Siegel was the attorney who was involved in the Cameo case at that point in time?

A Yes. [Pp. 100-104.]

TESTIMONY OF BORISLAV KRESOVIC
September 14, 1982
Cross examination by Mr. Underwood

A Because I think in point in time I didn't know what it meant because I didn't know we were put on. I didn't get the list. We got the list after the apology so I didn't know. I suspected but --

Q In other words, you got an apology for something --

A That I didn't know.

Q That you weren't aware that you even had been placed on the list yet and you got an apology before you were aware you were placed on the list?

A Yes, sir. [P. 3.]

TESTIMONY OF JANE PRESTON
September 16, 1982
Direct examinatin by Mr. Hesslink

Q. Mrs. Preston, where are you currently employed?

A. I work for the Wisconsin Division of Health, Bureau of Quality Compliance.

Q. And, you work out of the District No. 2 Office?

A. Yes.

Q. How long have you been employed in that position?

A. Since August 14, 1978.

Q. Do you have an occupation or profession?

A. Yes, I do. I am a registered nurse.

Q. How long have you been a registered nurse?

A. Since May 12, 1968.

Q. What is your current job title?

A. I have to [sic] two job titles, one is civil service as a nursing consultant; one, the second is an operative title and that is Health Facility Surveyor, RN classification.

Q. Do you have a function, job, are you a nurse surveyor?

A. That is what RN is.

Q. And, as long as you have worked at the District No. 2 Office, have you always held that same position?

A. Yes.

Q. Are you familiar with Cameo Convalescent Center?

A. Yes, I am.

Q. Were you in fact in Cameo Convalescent Center in either late December of '78 or early January of 1979?

A. Yes, I was.

Q. And, what was the purpose of your visit to Cameo at that point in time?

A. I was conducting what is referred to as a Verification visit of the September, 1978 survey.

Q. Prior to your entering the Cameo facility did you review anything prior to conducting that verification?

A. Yes, I did.

Q. What did you review?

A. I reviewed the Notices of Violation that had been written by the surveyor who conducted the survey and I was listened to the exit tape from the exit interview.

Q. By the "exit tape" you mean the it tape of Darla Senn?

A. Yes.

Q. How did you have occasion to review that exit tape?

A. It was given to me by my supervisor.

Q. That is, who was your supervisor?

A. Fran Richards.

Q. Okay. Was there anyone with you during all or part of this verification visit at Cameo?

A. Yes.

Q. Who was that person?

A. Do you mean facility staff or do you mean Bureau staff?

Q. I meant some other person from the Bureau.

A. Yes, there was.

Q. Who was that person?

A. Ms. Patricia Dosse.

Q. Who is Patricia Dosse?

A. At that time she was also an RN surveyor.

Q. Now, could you describe what occurred when you arrived at Cameo on January 2nd, was it January 2, 1979?

A. I believe the entire verification visit took from December 27 through January 2.

Q. Could you describe what happened when you arrived at Cameo for the verification visit?

A. I introduced myself to the receptionist, presented her with my card, informed her of the purpose of my visit, and then awaited the facility staff.

Q. And, what occurred after that?

A. I was introduced to the Director of Nursing.

Q. Who was the Director of Nursing?

A. Linda Hintz (ph).

Q. Had you known Linds [sic] Hintz prior to that date?

A. Yes, I had.

Q. How had you known Linda Hintz?

A. I was her instructor in nursing school.

Q. Where was that?

A. Elverno College.

Q. Now, what did you do at Cameo with respect to verifying the original survey?

A. I requested three weeks of staffing, a censor sheet for determining the population of the nursing home, had a tour of the facility, reviewed some clinical records, inspected the medication; have an exit interview myself, and I think that was about it.

. . . .

Q. Now, I show you a document which has been marked as Exhibit No. 69, and ask if you have seen that document before?

A. Yes, I have.

Q. Is that in fact your signature on that document?

A. It is.

Q. Is that document your report which you completed at the end of the verification visit at Cameo?

A. It is part of it.

Q. Okay. That is what we call the verification visit log sheet?

A. Log sheet.

Q. Now, as between you and Mrs. Dosse who was it that actually made decisions as to whether or not particular Notices of Violation were corrected or not?

A. It was a mutual decision.

Q. With respect to all of those?

A. Yes. [Pp. 65-69.]

TESTIMONY OF THOMAS VAN DE GRIFT
September 17, 1982
Direct examination by Mr. Hoornstra

Q. When did you discovery [sic] that Cameo had appealed?

A. On approximately April 12, 1979.

Q. All right. Do you remember what the law was at the time as to whether or not a nursing home that had appealed the decision to put them on the Suspension of Referrals List could be put on the List?

A. The law at that time was that if a home appealed from the List, that submitted a timely appeal, they have 10 days in which to appeal--if they submitted a timely appeal, they would not be placed on the published List.

Q. What action did you take, if any, when you discovered Cameo had appealed?

A. The first thing we did was to attempt to determine whether or not the appeal was timely submitted.

Q. What did you do to determine that?

A. The appeal was submitted on a blueback. It was a formal pleading. And, there was a place for a verification of the attorney's signature on the bottom of the last page. It was signed, but it was not dated. There was no other date on the document. So, we were unable to determine just be [sic] looking at the document when it was served or even when it was dated. And, I felt the first thing we ought to do is contact the person who verified the attorney's signature.

Q. Before you proceed--let me interrupt, and would you explain to the jury why it was important to determine the date?

A. The date for the, for the appeal, had long since passed. And, if, in other words, we knew what time, at what time the notice went to Cameo, when it was received, and so we were able to measure the 10 days in which they had time to appeal; and that 10 days terminated on April 30, excuse me--March 30, 1979.

Q. Okay. Proceed then, to tell the jury what you did to determine whether Cameo had appealed on time?

A. I asked David Siegel if he had any memory of when he received it and he indicated not. I asked people in, within the Bureau if they had

some knowledge as to how or when this thing was received. And finally, I asked--excuse me--I called the person whose name appeared on the appeal, who verified the attorney's signature. I called that person and asked when she had signed the document.

Q. Do you remember who that person was?

A. Jean Sodderholm, I believe her name was.

Q. Do you know what her connection with Cameo or its attorney was?

A. Jean Sodderholm is an attorney in Mr. Hesslink's firm.

Q. Please go ahead.

A. She indicated to me she had signed the document, verified Mr. Hesslink's signature on March 30,

1979. I then asked one of the clerical people in the Bureau of Quality Compliance, and I believe it was Nadene Dreher, to take the document over to Mr. Hesslink's firm and have her insert the date.

Q. Which document?

A. The document which was the appeal from the Suspension of Referrals List, the document submitted by Mr. Hesslink.

Q. Your direction to her was what?

A. I asked her to take the document to Jean Sodderholm, in Mr. Hesslink's firm, have her insert the date on which she verified Mr. Hesslink's signature.

Q. Okay, then what happened?

A. She came back with the document and it showed the date March 30, 1979.

Q. Do you remember by what date Cameo had to have its appeal in?

A. They had to have it in by March 30, 1979. Now, at this point we had no certain way of determining whether or not the appeal was timely. So we finally, when I say "we", I mean David Siegel and myself finally concluded--

Q. Explain to the jury why you had no certain way to determine whether they had appealed on time?

A. Because we did not know how or when the document came into the office. I was present when the document was first discovered in the office. I was in a room in an office that was shared by David Siegel and by another attorney on the staff named Dolores Kester. I was seated at my desk as was

Delores. Dave came in the office, our office.

Q. Dave?

A. Siegel. He had been out somewhere and he had a stack of--

Mr. HESSLINK: I object, your Honor, this is all hearsay.

THE COURT: Well, I believe he is testifying as to those items he observed. If there is hearsay that will be stricken.

MR. HOORNSTRA: I will be glad to lay the foundation.

BY MR. HOORNSTRA:

Q. Are you describing what you observed?

A. That's correct.

Q. Please proceed.

A. I was seated at my desk and Dave Siegel came in and he had been out of the office for a day or two. My

memory is he was out of town. There was a stack of mail on the left-hand corner of his desk that was about eight to ten inches high. He stood at his desk and proceeded to go through his mail. After he had gone through a number of documents he exclaimed something, some expletive, and asked what was this. And I asked him what he was referring to, and he showed me the document. And he asked me how it got there, and I said, "I do not know."

Q. Whose office were you --

A. I was in Dave Siegel's office and my office. We shared the same office. He expressed concern, said, "I didn't realize this was here."

MR. HESSLINK: Objection, your Honor.

THE COURT: Sustained.

THE WITNESS: He then left the office and came back shortly thereafter.

BY MR. HOORNSTRA:

Q. Return if you will, to your earlier discussion about ascertaining whether Cameo had appealed on time. Did you finally decide with certainty whether Cameo had appealed on time?

A. No, we never did. We had no way of determining on what date that document came into the office. I could find no one who could tell me how the document got into the office or, on what date it got into the office, so we finally concluded we would give them the benefit of

the doubt and we presumed the document was served on the date it was verified by Jean Sodderholm which was March 30; and therefore presumed it was timely submitted.

Q. May I have your exhibit? Mr. Vande Grift, I am showing you what has been marked as Exhibit 111, and it has been received. I believe as the Cameo appeal paper. And I call your attention to the first page that shows the writing of Nadene Dreher, and ask whether it was that on the paper you had in your office when you were trying to determine whether Cameo had appealed on time?

A. It was not.

Q. All right. Look at the second page, and where there exists the

verification blanks, and I ask whether or not, describe what part was blank on the copy you received?

A. The part that was blank was the date on which the person verifying Mr. Hesslink's signature, verifying it--it showed blank day of March, 1979. There was no date inserted for day.

Q. All right. What steps, if any, did you take once you learned and decided to treat their appeal as one having been filed on time?

A. After having determined that it was timely filed, um, I then contacted Peg Smelser, and that would have taken place, to the best of my recollection, on the following day, which was April 13, 1979. April 13

was Good Friday. The office was open half a day and we had approximately half our staff or less present.

Q. What did you tell Peg?

A. I informed her of the mistake. Because I knew that Cameo had appeared on the Suspension of Referrals List. And I advised her, I then asked her whether or not we had received any communication from either the Kresovics or Mr. Hesslink. And she said, "No." I told her then that before we could receive any communication from them whatever, any kind of complaint, any kind of appeal, that we should get the correction out. I said it was very important that we respond without any input from them.

Q. Why did you say that?

A. Because I suspected that they would attempt to make an issue out of it. So I told her even though it was Good Friday that the document correcting the mistake had to go out that day and that a copy at a minimum had to be delivered to Mr. Hesslink that day.

Q. Copy of what?

A. A copy of the letter correcting the error, placing Cameo on the Suspension of Referrals List.

Q. Do you know whether such a letter went out that day?

A. Yes, it did.

Q. I am going to show you what has been received, I believe, as Exhibit 134, purporting to be a

letter from Mr. Fiss to Mr. Kresovic of April 13, and asked [sic] whether or not that is the letter you referred to?

A. It is the letter to which I have referred.

Q. Okay, I now show you what has been marked as Exhibit 1054, and ask--which purports to be a letter from Mr. Fiss to various county agencies, and ask whether you can identify that?

A. That is also the document that was prepared to correct the error. [Pp. 108-15.]

TESTIMONY OF DRAGOMIR KRESOVIC
September 15, 1982
Direct examination by Mr. Hesslink

Q What was the next involvement you had with any of the State surveyors following that initial conference?

A During the survey, I afforded my office, my desk, my telephone to Darla Senn, registered nurse.

Q And what contact did you have with her?

A She asked for policy manuals, procedure books, agreements with independent providers and other paper compliance manuals.

Q And what did you do with respect to that request?

A I afforded her sets of books and provided her agreements, whatever she asked for.

Q Did Mrs. Senn ever request any information from you during the

survey process which you did not provide?

. . . .

THE WITNESS: I provided everything she requested.

. . . .

Q What was your next contact with Mrs. Senn?

A As she begun review of those documents, she asked me to come in and to respond to some of her questions.

Q What were the questions that you had?

A Number one, she asked me why don't I have a job description for the medical director.

. . . .

[Pp. 48-50.]

Q Did you, in fact, accompany Mrs. Senn when she did the tour of the building?

A Yes, I did.

Q Okay. Did anyone else accompany you and Mrs. Senn?

A I believe there were some other nurses, yes. [P. 52.]

. . . .

Q Were you present at the 1978 exit interview at Cameo?

A Yes, sir, I was. [P. 58.]

. . . .

Q Go ahead. Describe what happened.

A The exit interview started at eleven o'clock in the morning on September 19, 1978. Present were Mr. Gunderson as a chairperson, Darla Senn as a registered nurse surveyor, Ms. Nancy Kacynski as social worker surveyor. Members of

our staff were Mr. Bob Hesslink as attorney, Mrs. Miriam McDonald, Bob Kresovic, myself, Linda Hintz, Dr. Stoola. . . . [Pp. 59-60.]

State of Wisconsin
Department of Health
and Social Services

DATE: April 13, 1979

TO: All County Social Service Agencies, 51.42 and 51.437 Boards and other interested parties

FROM: Charles J. Fiss, Jr.
Director
Bureau of Quality Compliance

RE: Cameo Convalescent Center

Please note that Cameo Convalescent Center, license #2230, was placed on the April, 1979 Suspension of Referrals List in error. Please disregard this listing. Residents may be referred to the facility without restriction.

Please accept our apologies for any confusion or inconvenience this may have caused your agency.

CJF:dle

State of Wisconsin
Department of Health
and Social Services

April 13, 1979

Dragomir Kresovic
Administrator
Cameo Convalescent Center
5790 South 27th Street
Milwaukee, WI 53221

Dear Mr. Kresovic:

Please be advised the Bureau of Quality Compliance has rescinded its decision to place Cameo on the Suspension of Referral List pursuant to Chapter 50, Wis. Stats. Your appeal of the decision to place Cameo on the Suspension of Referral List was not discovered until after the list had been published.

We regret the error and are now advising the recipients of the list that Cameo

has been removed and may admit patients without restriction.

Sincerely,

Charles J. Fiss, Jr.
Director
Bureau of Quality Compliance

CJF:dle

cc: Robert M. Hesslink, Jr.

Wis. Stats. (1977) sec. 50.03(11)(a) and (b), 1977 Wis. Laws ch. 170, sec. 28:

> 50.03(11) JUDICIAL REVIEW. (a) All administrative remedies shall be exhausted before an agency determination under this subchapter shall be subject to judicial review. Final decisions after hearing shall be subject to judicial review exclusively as provided in s. 227.15, except that any petition for review of department action under this chapter shall be filed within 15 days after receipt of notice of the final agency determination.
>
> (b) The court may stay enforcement s. 227.17 of the department's final decision if a showing is made that there is a substantial probability that the party seeking review will prevail on the merits and will suffer irreparable harm if a stay is not granted, and that the facility will meet the requirements of this subchapter and the rules established under this subchapter during such stay. Where a stay is granted the court may impose such conditions on the granting of the stay as may be necessary to safeguard the lives, health, rights, safety and welfare of

residents, and to assure compliance by the facilty with the requirements of this subchapter.

Wis. Stats. (1977) sec. 50.04(3) and (4), 1977 Wis. Laws ch. 170, sec. 29:

(3) INSPECTION REPORTS. (a) Inspection. The department shall make or cause to be made at least one inspection annually of each nursing home in the state within 120 days prior to license issuance or renewal.

(b) Annual report. The department shall make at least one report on each nursing home in the state annually. All conditions and practices not in compliance with applicable standards within the last year shall be specifically stated. If a violation is corrected, is contested or is subject to an approved plan of correction, the same shall be specified in the annual report. The department shall send a copy of the report to the nursing home and shall provide a copy to any person on request. The department may charge a reasonable fee to cover copying costs.

(c) Posting of notice. The nursing home administrator shall retain a copy of the most recent annual report prepared by the

department under par. (b) and shall post in a place readily visible to residents and visitors, such as the lobby or reception area of the facility, a notice stating that a copy of the report is available for public inspection on request to the administrator and that a copy will be provided by the department upon request for a minimal fee.

(4) NOTICE OF VIOLATION; CORRECTION. (a) Notice of violation. If upon inspection or investigation the department determines that a nursing home is in violation of this subchapter or the rule promulgated thereunder, it shall promptly serve a notice of violation upon the licensee. Each notice of violation shall be prepared in writing and shall specify the nature of the violation, and the statutory provision or rule alleged to have been violated. The notice shall inform the licensee of the right to a hearing under par. (e) and of the provisions for placement of the nursing home on the list prepared under par. (d), if applicable. The written notice of a class "A" violation may be written and served by an agent of the department at the time of the inspection.

(b) Classification of violations. 1. A class "A" violation is a violation of this subchapter or of the rules promulgated thereunder which

creates a condition or occurrence relating to the operation and maintenance of a nursing home presenting a substantial probability that death or serious mental or physical harm to a resident will result therefrom.

2. A class "B" violation is a violation of this subchapter or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a nursing home directly threatening to the health, safety or welfare of a resident.

(3) A class "C" violation is a violation of this subchapter or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a nursing home which does not directly threaten the health, safety or welfare of a resident.

4. Each day of violation constitutes a separate violation. Except as provided in sub. (5)(a)4, the department shall have the burden of showing that a violation existed on each day for which a forfeiture is assessed. No forfeiture may be assessed for a condition for which the nursing home has received a variance or waiver of a standard.

(c) Correction. 1. The situation, condition or practice constituting a class "A" violation shall be abated or eliminated immediately unless a fixed period of time, as determined by the department and specified in the notice of violation, is required for correction. If the class "A" violation is not abated or eliminated within the specified time period, the department shall maintain an action in circuit court for injunction or other process against the licensee, owner, operator, administrator or representative of the facility to restrain and enjoin violation of applicable rules, regulations and statutes.

2. At the time of issuance of a notice of a class "B" or "C" violation, the department shall request a plan of correction which is subject to the department's approval. The nursing home shall have 15 days after receipt of notice of violation in which to prepare and submit a plan of correction but the department may extend this period up to 30 days where correction involves substantial capital improvement. The plan shall include a fixed time period within which violations are to be corrected. If the nursing home plan of correction is substantially in compliance, it may be modified upon agreement between

the department and the nursing home to achieve full compliance. If it rejects a plan of correction, the department shall send notice of the rejection and the reason for the rejection to the nursing home and impose a plan of correction. The imposed plan of correction may be modified upon agreement between the department and the nursing home.

3. If the violation has been corrected prior to submission and approval of a plan of correction, the nursing home may submit a report of correction in place of a plan of correction. Such report shall be signed by the administrator under oath.

4. Upon a licensee's petition, the department shall determine whether to grant a licensee's request for an extended correction time. Such petition must be served on the department prior to expiration of the correction time originally approved. The burden of proof is on the petitioner to show good cause for not being able to comply with the original correction time approved.

(d) Suspension of referrals. The department shall prepare on a monthly basis a list containing the names and addresses of all nursing homes with existing class "A" violations as defined in par. (b) 1 or with 5 or more existing

violations of any type, for which a plan of correction has not been timely submitted to the department under par. (c), for which a plan of correction has been disapproved or for which an approved plan of correction has not been carried out. A copy of the monthly list of violators shall be sent to each county welfare director and each s. 51.42 or 51.437 board director in the county in which each nursing home listed is located. The department shall notify each nursing home placed on the list of such placement at least 10 days prior to issuance of the list. No nursing home may be placed on the list unless a hearing has been held under par. (e) and a final determination has been made by the department or the time for requesting a hearing has passed and no request has been made. A nursing home shall be removed from the list when all corrections are made or when a plan of correction for all deficiencies is approved by the department. The list shall indicate those nursing homes which have been removed from the list during the prior month.

2. No county social services department or board under s. 51.42 or 51.437 may refer persons to nursing homes on the list prepared under this paragraph.

3. No nursing home which is placed on the list prepared under this paragraph due to an existing class "A" violation or due to 5 or more existing class "B" violations may admit residents until it is removed from the list. Violation of this subdivision constitutes a class "B" violation.

4. The department may make exceptions to subd. 2 or 3 where there is a lack of facilities of the same type in the area sufficient to satisfy the demand for the type of service provided by the home.

5. The department may provide information from the list to any agencies which make referrals to nursing homes.

(e) Hearings. 1. If a nusing home desires to contest any department action under this subsection, including rejection and imposition of a plan of correction, or suspension of referrals or admissions, it shall send a written request for a hearing under s. 227.07 to the department within 10 days of receipt of notice of the contested action. All agency action under this subsection arising out of a violation or rejection and imposition of a plan of correction shall be the subject of a single hearing. The department shall commence the hearing within 30 days of the

request for hearing, within 30 days of the department's imposition of a plan of correction, whichever is later. The department shall send notice to the nursing home in conformance with s. 227.07. Issues litigated at the hearing may not be relitigated at subsequent hearings under this paragraph arising out of the same violation.

2. The department shall notify the nursing home of its decision to reverse, modify or uphold the contested action within 10 days after the close of the hearing.

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CLERK

No. 84-505

In The

Supreme Court of the United States

October Term, 1984

DONALD E. PERCY, et al.,

Petitioners,

v.

CAMEO CONVALESCENT CENTER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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October 25, 1984

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QUESTIONS PRESENTED

1. Is a denial of a right to receive referrals from state and county agencies, without an opportunity to be heard, a deprivation without due process, where postdeprivation state tort remedies may be available?

2. Was the trial court's failure to give a conspiracy instruction, where otherwise warranted, harmless error, rather than the prejudicial error as found by the Court of Appeals?

3. Did the due process clause of the Fourteenth Amendment entitle the respondent to notice and an opportunity to be heard prior to a denial of the right to receive referrals from state and county agencies?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners, Donald E. Percy, Darla C. Senn, Robert Durkin, Charles J. Fiss, Jr., Peggy Ann Smelser, Louis E. Remily, David L. Siegel, Thomas G. Van de Grift, Milton J. Stearns, Fran Richards, Kathleen Rubin, Nancy Kacynski and Janet Zanck.

Respondent, Cameo Convalescent Center, Inc., and in addition, plaintiffs, Dragomir Kresovic, Borislav Kresovic and Linda Hintz.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings Below	ii
Authorities Cited	iv
Statement of the Case	1
Summary of Argument	7
Argument	8
I. THE CIRCUIT COURT'S DECISION IS NOT IN CONFLICT WITH *HUDSON V. PALMER*	10
II. THE CIRCUIT COURT'S DECISION WAS NOT INCONSISTENT WITH EITHER THIS COURT'S RULING OR RULINGS OF OTHER CIRCUIT COURTS ON THE ISSUE OF LIABILITY BASED ON CONSPIRACY	12
A. The Circuit Court's Ruling Does Not Conflict With Prior Decisions Of This Court	13
B. The Holding Of The Circuit Court Does Not Conflict With That Of Other Circuits On The Same Issue	14
III. THE CIRCUIT COURT'S DECISION DID NOT CONFLICT WITH THIS COURT'S PRIOR DECISIONS ON THE QUESTION OF WHETHER CAMEO WAS ENTITLED TO A PREDEPRIVATION HEARING	17
A. The Arguments Advanced By The Petitioners Were Not Previously Raised	18
B. The Circuit Court's Decision Does Not Conflict With This Court's Prior Holdings On Corporate Liberty Interests	19

TABLE OF CONTENTS—Continued

Pages

C. The Petitioners' Actions Do Not Fall Within The Emergency Exception To The Predeprivation Hearing Requirement 24

Conclusion 26

Appendix A1

AUTHORITIES CITED

CASES:

Adickes v. S.H. Kress & Company, 398 U.S. 144 (1970) 13

Barry v. Barchi, 443 U.S. 55 (1979) 26

Birnbaum v. Trussell, 371 F.2d 672 (2nd Cir. 1966) ..15, 16

Boddie v. Connecticut, 401 U.S. 371 (1971) 25

Brown County v. Department of Health and Social Services, 103 Wis. 2d 37, 307 N.W.2d 247 (1981) 23, 24

County of Dane v. Department of Health & Social Services, 79 Wis. 2d 323, 255 N.W.2d 539 (1977) 23

Dennis v. Sparks, 449 U.S. 24 (1980) 13

Ellis v. Dixon, 349 U.S. 458, rehearing denied, 350 U.S. 855 (1955) 18

Fact Concerts, Inc. v. City of Newport, 626 F.2d 1060, 1063 (1st Cir. 1980) 19

Fahey v. Mallonee, 332 U.S. 245 (1947) 8, 24

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 8, 19, 20, 21, 24

Gallick v. Baltimore & Ohio Railway Company, 372 U.S. 108 (1963) 17

Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981) 8, 24

AUTHORITIES CITED—Continued

Pages

Hostrop v. Board of Junior College District No. 515, 523 F.2d 569, cert. denied, 425 U.S. 693 (7th Cir. 1975) 14

Hudson v. Palmer, 468 U.S. —, 82 L.Ed. 2d 393 (1984) 10, 11, 12

Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982) 7, 11, 25, 26

Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980) 20

Mathews v. Eldridge, 424 U.S. 319 (1976) 8, 26

Monell v. Department of Social Services, 436 U.S. 658 (1978) 13

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 19

Northwestern National Life Insurance Company v. Riggs, 203 U.S. 243, 255 (1906) 19, 20, 21, 22, 23, 24

Parratt v. Taylor, 451 U.S. 527 (1981) 7, 10, 11, 12

Phillips v. Trello, 502 F.2d 1000 (3rd Cir. 1974) 15

Rizzo v. Goode, 423 U.S. 362 (1976) 13

Stoehr v. Wallace, 255 U.S. 239, 246-247 (1921) 26

Western Turf Association v. Greenberg, 204 U.S. 359, 363 (1907) 19, 21, 22, 24

STATUTES:

42 U.S.C. § 1983 ..... 13, 14, 15, 16, 17

Wis. Stat. § 50.04 12

OTHER AUTHORITIES:

Supreme Court Rule 17 ..... 7, 8, 9, 12, 18

Supreme Court Rule 28.1 1

United States Constitution, First Amendment 6, 20

AUTHORITIES CITED—Continued

Pages

United States Constitution, Fourteenth Amendment 6, 8, 9, 20, 22

United States Constitution, Ninth Amendment 6

No. 84-505

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

STATEMENT OF THE CASE

Cameo Convalescent Center, Inc. (Cameo) is a family held corporation in Milwaukee, Wisconsin, whose primary business is operating a licensed nursing home.[1] Nursing

[1] Pursuant to Rule 28.1, Cameo asserts that it has no parent company, subsidiaries or affiliates.

homes are subject to extensive federal and state regulation and, in Wisconsin, the Wisconsin Department of Health and Social Services (WDHSS) monitors the compliance of nursing homes with these federal and state regulations. This action arose by virtue of certain enforcement actions taken by the WDHSS in 1978 and 1979.

On September 19, 1978, Darla Senn, a nurse-surveyor and employee of the WDHSS, together with another state surveyor, Nancy Kacynski, served thirty-four notices of violation (NOV's) upon Cameo. (Exs. 22 and 23) On October 17, 1978, the WDHSS imposed a plan of correction upon Cameo requiring that all these deficiencies be corrected within one day. (Ex. 47) Despite a timely appeal of both the NOV's and the imposed plans of correction, Cameo never received a hearing within the thirty-day period required under Wisconsin law (Exs. 36 and 54A) In fact, no hearing had been held prior to the time that Cameo was placed on the suspension of referrals list, as will later be discussed. (Resp. App. 12A)

On October 26, 1978, Kacynski conducted a verification visit to determine if Cameo had complied with the plans of correction for the three social services notices of violations. Kacynski found that all three of the alleged violations in the social services area had been corrected. (Ex. 54)

On January 2, 1979, another verification visit was conducted. Of the thirty-one violations alleged by Senn, twenty-four were found to have been corrected, acceptable progress was found to have been made with respect to four, and only three remained uncorrected. (L. 7-9)

From the outset Cameo had strongly opposed the issuance of the NOV's, contending that they were without

merit. (Exs. 36, 54A, 68, 96, 108 and 115) Cameo suggested that the NOV's had been issued in retaliation for comments Cameo had made to Wisconsin government representatives concerning what Cameo alleged to be the poor quality and biased nature of the annual nursing home surveys which the WDHSS conducted. (Ex. 108) At trial, Cameo proffered evidence that Senn, shortly after issuing the NOV's, told another surveyor "You know, I intend to screw them [Cameo]." (Ex. 327)

Other evidence which Cameo produced at trial showed that the other WDHSS defendants became increasingly aware that many of the NOV's issued by Senn were meritless, but the WDHSS continued to pursue them nonetheless. (Resp. App. 7A-9A) In a series of memos, one of the attorneys for WDHSS detailed the legal and factual deficiencies of these NOV's. (Resp. App. 1A-7A)

On March 21, 1979, Cameo was notified that it was being placed on the WDHSS' Suspension of Referrals list. (Resp. App. 10A-12A) The legal effect of placements of a home upon the SOR list is to preclude state and county social service agencies and departments from referring nursing home patients to that home. The SOR list is, in effect, a legally enforceable blacklist.

The Suspension of Referrals list (SOR list) was compiled by the WDHSS monthly and consisted of nursing homes with at least five outstanding uncorrected violations of the type served on Cameo. As of the time of the verification visit, Cameo was alleged to have had only three outstanding uncorrected NOV's. (Resp. App. 2A-3A)

Cameo's notice alleged that seven outstanding and uncorrected NOV's supported Cameo's placement on the list.

Fully five of the seven NOV's which were ostensibly responsible for Cameo's placement on the SOR list were identified as without reasonable merit by Siegel in his May 9, 1979 memo.[2] This information had been orally relayed to various other defendants responsible for compiling that list as early as late 1978 or early 1979. (Resp. App. 7A-9A)

Subsequently Cameo was also notified that it was being placed on the Suspension of Admissions list. (Ex. 160) The legal effect of being placed on the Suspension of Admissions list is to preclude the home from admitting any new patients whatsoever. That notification of placement on the Suspension of Admissions list was based upon a change in three findings from "corrected" to "uncorrected" by the original verification visit surveyor, Jane Preston, more than four months after the verification visit had taken place. (Ex. 135) Ms. Preston indicated that she was writing the memo to change her findings, "as instructed by D. Siegel."

All three of the NOV's, regarding which Jane Preston was instructed to change her findings, and which then formed the basis for Cameo being notified of its placement on the Suspension of Admissions list, were also identified by Siegel as without merit in that same memo.[3] In short, none of the defendants took action to dismiss the NOV's which were responsible for the sanctions imposed

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[2] Resp. App. 4A-7A. The five NOV's were nos. 111810, 111811, 111802, 111807 and 111809.

[3] Ex. 131, Resp. App. 4A-7A. These three NOV's were nos. 111805, 111806 and 111829. Of 111805 and 111806, Siegel says, "This citation is 100% unsupportable because of wholly inadequate investigation and flaky conclusions of law." Of 111829, he says, "So what?"

upon Cameo, even though it was known at an early date that they were without merit.

Wisconsin law provided that no nursing home could be placed on the SOR list unless it has been afforded the opportunity for a hearing prior to its placement on the list. Despite a timely appeal by Cameo of its placement on the list,[4] no hearing was ever held. Cameo's name appeared upon the April SOR list which was forwarded to over 600 social service departments and agencies. No copy of that SOR list, however, was ever sent to Cameo by WDHSS. (Exs. 308-310)

Subsequent to the publication of Cameo's name on the SOR list, one of the defendants sent an unsigned "memorandum" to at least one of the recipients of the SOR list indicating that Cameo had been placed on the SOR list "in error." (Pet. App. p. 104) Cameo introduced evidence tending to show that it was unlikely that at least certain of the defendants would have been unaware at the time the list was published that Cameo had appealed. (Resp. App. 16A-17A)

The statute, as well as the language of the list itself, however, provided that, once a facility was placed on the list, no referrals could be made to that facility until a subsequent list had been published and that facility had been listed in the "removal of restrictions" section. (Resp. App.

---

[4] Petitioner contends that Cameo "was given the benefit of the doubt as to timeliness." (Petition for Writ at p. 16) In reality, there was never any doubt as to timeliness. Cameo had ten days after receipt of the notification of placement to file its appeal. It received the notice on March 21, 1979. (Resp. App. 10A-12A) On March 30, the ninth day after receipt, Cameo had hand-carried its appeal to the Department, filed it with the proper person, and had that person sign to acknowledge receipt of the document. (Pet. App. 71-73 and Resp. App. 13A-15A)

18A-20A) When the May SOR list was published, however, Cameo's name was not included in the "removal of restrictions" section. (Resp. App. 21A-22A) In fact, no official notification was ever given to the recipients of the list that Cameo had had its SOR restrictions removed.[5]

Ultimately, the NOV's issued by Senn were the subject of a stipulated settlement between Cameo and the WDHSS. (Ex. 256) Prior to that stipulation, however, Cameo had been required to defend itself in 18 days of administrative hearings. (R. 219, Tr. Vol. 1, p. 75) That stipulation provided for a dismissal of almost all of the NOV's and restrictions on the legal effect which could be given the remainder.

In 1979, other defendant surveyors issued additional NOV's against Cameo and WDHSS again imposed plans of correction. After Cameo appealed, and additional hearings were held, these NOV's were disposed of by stipulation in essentially the same fashion as those issued in 1978. (Ex. 275)

The Respondent and other plaintiffs filed this action alleging that, as a result of defendants' actions, they suffered substantial and direct economic losses, loss of business reputation and deprivations of their constitutional rights under the First, Ninth and Fourteenth Amendments of the Constitution. A bifurcated jury trial was held. At the conclusion of the liability phase of the trial, the jury found that Senn had acted with malice in preparing and prosecuting the NOV's against Cameo, and that the NOV's were prepared and prosecuted against Cameo for ulterior or improper motives. No other defendant was found liable.

---

[5] The only recipient of the April SOR list whom the defendant established at trial had received even the unsigned memorandum of "retraction" was the Milwaukee County Department of Social Services.

The jury awarded Cameo compensatory damages of $65,000 and punitive damages of $10,000. Both Cameo and Senn appealed the trial court's subsequent judgment confirming the jury verdicts.

In its appeal, Cameo contended that the district court had made three errors which are relevant to the questions presented in this petition. First, Cameo contended that the trial court erred in refusing to provide the jury with Cameo's proffered instructions on conspiracy. The circuit court agreed. Secondly, Cameo contended that the district court erred in refusing to instruct the jury, as Cameo had requested, that Cameo was entitled to a due process hearing prior to its being placed on the SOR list. The circuit court agreed with this contention as well. Finally, Cameo argued that it was entitled to its proffered jury instruction that its rights would have been violated by reckless, as well as by intentional, conduct of the defendants. The circuit court also agreed with this contention. That court then remanded the case to the district court for a new trial with proper jury instructions on the plaintiff's theory of its case.

SUMMARY OF ARGUMENT

Certiorari should not be granted in this case because the reasons stated in the petition do not meet the standards set forth in Supreme Court Rule 17.

This Court's prior decision in *Logan v. Zimmerman Brush Company,* 455 U.S. 422 (1982) clearly held that the *Parratt v. Taylor,* 451 U.S. 527 (1981) exception to the predeprivation hearing is not applicable where, as here, the deprivation occurs during the course of a state procedure, rather than as a result of a random unauthorized tort by a state employee. Thus, the circuit court's decision was not in conflict with the decisions of this Court.

There is also no inconsistency among the circuit courts on how liability may be assessed on the basis of conspiracy. All circuits have held that conspiracy serves as a basis for assigning liability for a deprivation, it does not constitute a deprivation in and of itself. The circuit court so held in this case, and this Court need not exercise its discretion to grant the writ in order to resolve a conflict among the circuits.

It would also be inappropriate for this Court to grant the writ in order to address the petitioners' arguments that a corporation does not have a protected liberty interest under the Fourteenth Amendment, or that a predeprivation hearing was not constitutionally required, since neither of those arguments were raised prior to the filing of the petition.

Even if the Court were to look beyond the petitioners' prior waiver of these arguments, the petition shows no reason why these issues are significant federal questions requiring resolution by this Court. This Court has previously addressed the corporate liberty interest argument in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978) and resolved it in a manner consistent with the circuit court here. Similarly, the *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264 (1981), *Fahey v. Mallonee,* 332 U.S. 245 (1947) and *Mathews v. Eldridge,* 424 U.S. 319 (1976) decisions, upon which the petitioner relies, are clearly distinguishable from the present case.

ARGUMENT

The factors which this Court will consider in determining whether to grant a petition for certiorari are contained in Rule 17. That section provides, in relevant part, that the Court will consider a petition for certiorari in the following circumstances:

"RULE 17. Considerations governing review on certiorari

* * * *

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * * *

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

* * * *

The petitioner proposes three issues for review by this Court. First, the petitioner argues that Cameo's denial of the right to receive referrals from state and county agencies without an opportunity to be heard, was not an unconstitutional deprivation since there were adequate state remedies available. Second, the petitioners argue that the trial court's failure to give a conspiracy instruction was only "harmless error." Finally, petitioners argue that the Fourteenth Amendment did not entitle Cameo to an adversary hearing prior to the denial of its right to receive referrals.

Petitioners do not argue that the circuit court's decision on these points conflicted with any decision of any other court of appeals or state court of last resort on a general principle of federal law. Nor does the petition argue that there are important questions of federal law presented which have not heretofore been decided.

While acknowledging that the failure to instruct on conspiracy was error, the petitioners argue that the specific facts of this case, as viewed by the petitioners, render that error "harmless." This is hardly the type of issue towards which this Court should direct its limited resources.

Thus, the sole questions presented for possible review by the petitioners is whether the circuit court's decision represents such departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision or whether the petition is from a decision, on a federal question, which is in conflict with the applicable decisions of this Court. We contend that the proceedings before the circuit court on the questions presented in the petition neither represent a departure from accepted practice nor are in conflict with any decision of this Court. It follows that the granting of a petition for certiorari to review these questions would be inappropriate.

I. THE CIRCUIT COURT'S DECISION IS NOT IN CONFLICT WITH HUDSON V. PALMER.

Petitioner argues that the circuit court's opinion directly conflicts with this Court's ruling in *Hudson v. Palmer,* 468 U.S. —, 82 L.Ed. 2d 393 (1984), a decision rendered subsequent to the opinion of the court of appeals in this case.

In *Hudson,* this Court extended *Parratt v. Taylor,* 451 U.S. 527 (1981) to cases involving intentional, as well as negligent, deprivations of protected interests. Thus, in certain circumstances, a postdeprivation remedy may not violate the due process clause, even if the deprivation is the result of intentional misconduct. However, this Court specifically acknowledged in *Hudson* that a postdepriva-

tion state remedy does *not* satisfy due process where the deprivation is effected pursuant to an established state procedure, as opposed to a random, unauthorized tort not related to an established state procedure. 82 L.Ed. 2d at p. 407.

In distinguishing between the two types of deprivations, the Court relied heavily upon its prior decision in *Logan v. Zimmerman Brush Company,* 455 U.S. 422 (1982). In *Logan,* this Court declined to extend the *Parratt v. Taylar* rationale to a situation where the interest involved was deprived pursuant to a state procedure. In so finding, this Court specifically held that:

> "This argument misses Parratt's point. In *Parratt,* the Court emphasized that it was dealing with 'a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure.' 451 U.S., at 541, 68 L.Ed. 2d 420, 101 S. Ct. 1908. Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law. *Parratt* was not designed to reach such a situation." 455 U.S. at pp. 435-436.

The petitioner pointedly omits any reference to the *Logan* decision, even though that decision, and the reasoning of that decision, were specifically referred to and incorporated in *Hudson* on more than one occasion. The language of *Hudson* itself, for example, specifically notes that "postdeprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action." 82 L.Ed. 2d at p. 407.

In the instant case, Cameo was not deprived of its protected interests through an unauthorized and random action by a miscreant state employee. Rather, Cameo's name was placed on the SOR list, a blacklist of nursing

homes, as part of an officially sanctioned enforcement procedure. This whole enforcement scheme was established by state statute. See, Wis. Stat. §50.04. Thus, the narrow exception created in *Parratt* and *Hudson* are simply inapplicable to this case. It follows that the circuit court's decision, not being in conflict with those cases, is not in need of review.

Even assuming *arguendo* that a good faith *Hudson v. Palmer,* or *Parratt* argument could be advanced, and we do not think that one could be, the factual question of whether the acts at issue in this proceeding were "random and unauthorized" has never been decided. Indeed, the petitioner never requested that such questions be submitted to the jury. Thus, this type of question seems more appropriately addressed to the jury on remand, than to this Court.

It logically follows that, since the circuit court's opinion was not in conflict with this Court's holdings, Rule 17 does not support the granting of certiorari on this basis.

II. THE CIRCUIT COURT'S DECISION WAS NOT INCONSISTENT WITH EITHER THIS COURT'S RULINGS OR RULINGS OF OTHER CIRCUIT COURTS ON THE ISSUE OF LIABILITY BASED ON CONSPIRACY.

The petition for certiorari appears to contend that this Court should grant certiorari because the circuit court's ruling, that the failure to give the conspiracy instruction was reversible error, conflicts with other decisions of both this Court and other circuit courts of appeal. For the reasons which follow, neither this Court's prior opinions nor opinions of other circuit courts are in conflict with the circuit court's holding in this case.

A. The Circuit Court's Ruling Does Not Conflict With Prior Decisions Of This Court.

The petitioner apparently argues that, because liability under 42 U.S.C. § 1983 is direct and personal, as opposed to vicarious, that no defendant could be found liable for the violation of Cameo's rights under a conspiracy theory, citing *Monell v Department of Social Services,* 436 U.S. 658 (1978) and *Rizzo v. Goode,* 423 U.S. 362 (1976). Those cases, however, relate solely to whether a municipality, or a supervisor, can be liable for the acts of an employee or subordinate where the municipality or the supervisor have had no involvement in, nor knowledge and approval of, the conduct of those employees or subordinates. Where the complaint alleges, or the facts show, that such a conspiracy existed, this Court has not hesitated to find such liability. See, for example, *Adickes v. S.H. Kress & Company,* 398 U.S. 144 (1970) and *Dennis v. Sparks,* 449 U.S. 24 (1980).

In *Dennis,* the plaintiff sought relief from a private individual who had allegedly conspired with a judge, through bribery and other corrupt means, to obtain an injunction which deprived the plaintiff of a property interest. While the Court found the judge to be absolutely immune from suit, it also found that an action could be maintained against the co-conspirators even though they had not themselves issued the injunction which caused the injury. Thus, the prior rulings of this Court are consistent with the circuit court's holding that liability will lie under a conspiracy theory, even when the individual defendant did not personally take the action which caused the legal harm to the plaintiff.

Thus, the circuit court's holding that the petitioners can be held liable for a deprivation of Cameo's protected

interest under a theory of conspiracy does not conflict with any prior holdings of this Court.

B. The Holding Of The Circuit Court Does Not Conflict With That Of Other Circuits On The Same Issue.

The petition contends that there is a division among the circuits on the question of whether a conspiracy, in and of itself, is sufficient to state a claim under 42 U.S.C. § 1983. It also contends that the circuit court below held conspiracy to constitute a separate actionable claim. Not only did the circuit court in this case not make such a finding, but there is no dispute on this issue among the circuits.

It is well settled that to give rise to a cause of action, a conspiracy must result in an overt illegal act. However, individual liability of the participants in that conspiracy arises from their participation or acquiesce in the common illegal scheme. Each individual participant in an unlawful conspiracy need not engage in the overt acts causing the injury in order to be liable. The circuit court below made explicit in *Hostrop v. Board of Junior College District No. 515,* 523 F.2d 569, cert. denied 425 U.S. 693 (7th Cir. 1975), that conspiracy extends liability to persons other than the actual wrongdoer.

> "The doctrine of civil conspiracy extends liability for a tort, here the deprivation of constitutional rights, *to persons other than the actual wrongdoer.* . . . 'The charge of conspiracy in a civil action is merely the string whereby the plaintiff seeks to tie together those who, acting in concert, *may be held responsible for any overt act or acts.*'
>
> '[*A*] *conspiracy may be used as the legal mechanism through which to impose liability on each and all the defendants without regard to the person doing the particular act.*'" 523 F.2d at p. 576. (Emphasis added)

But that circuit court has never held, and it did not hold in this case, that a conspiracy, without any other deprivation, is actionable under § 1983.

The petition cites two circuit court cases which, it contends, adhere to the view that conspiracy is actionable in and of itself. *Phillips v. Trello,* 502 F.2d 1000 (3rd Cir. 1974) and *Birnbaum v. Trussell,* 371 F.2d 672 (2nd Cir. 1966). In reality, neither of those two decisions have recognized such an independent actionable claim for conspiracy.

In *Phillips,* the circuit court reversed an order of the district court which dismissed the complaint of the plaintiffs for failure to state a cause of action under 42 U.S.C. § 1983. That complaint alleged, among other things, that the plaintiff had been "struck with a blackjack," was "taken to the police station, booked, placed in cells and held" and subjected to unreasonable searches of their residences. *Phillips v. Trello, supra,* at n. 2. The circuit court reversed the dismissal of the complaint, but in doing so, specifically based its decision on the fact that the complaint alleged a specific deprivation in addition to the allegation of conspiracy, stating that:

> "An action based upon § 1983 involves two distinct elements. First, *the plaintiff must assert a deprivation of rights,* privileges and immunities secured by the Constitution and laws." 502 F.2d at p. 1004. (Emphasis added)

At no point did that court state or infer that a conspiracy, without more, was actionable.

Similarly, in the *Birnbaum* case, the Second Circuit Court of Appeals reviewed a decision of the district court which dismissed a complaint which alleged that the defendant had conspired to have the plaintiff discharged from his position as an attending physician at a municipal

hospital. The court, in reversing that decision specifically held that "liability under the section must be based upon the 'deprivation of any rights, privileges or immunities secured by the Constitution and laws. . . .' " 371 F.2d at p. 676. It did not hold that a conspiracy, in and of itself, without any deprivation, would constitute an actionable claim under 42 U.S.C. § 1983.

Thus, the first prong of the petitioners' argument, that there is a conflict between the circuits on the applicable law as it relates to the liability created by conspiracy, is simply unfounded.

Moreover, the second prong of the petitioners' argument is equally ill-founded. For, the circuit court's opinion specifically recognizes that the plaintiffs, in order to prevail, will need to establish that the conspiracy actually resulted in the deprivation of a constitutionally protected interest, stating that:

> "The main thrust of plaintiffs' case was that the defendants had acted in concert to *deprive the plaintiffs of constitutionally protected rights.*" (Pet. App at p. 18) (Emphasis added)

In a subsequent portion of its opinion, the circuit court again emphasized that it was not basing its decision solely on the evidence of the existence of a conspiracy. Rather, in explaining its finding that the trial court's instruction on the due process rights of the plaintiff were erroneous, the court stated:

> "Cameo properly asserts a cognizable due process claim because Cameo's placement upon the SOR [Suspension of Referrals] list without the requisite hearing not only damaged Cameo's reputation but also altered Cameo's legal status. Cameo's placement upon the SOR list, like the individual placed on the list of known drunks in *Davis, deprived Cameo of a right* under state law: the right to receive referrals

from state social service departments and agencies." Pet. App. at pp. 31-32) (Emphasis added)

What the petitioners appear to contend is that since the jury could not identify the defendant(s) who was "personally and directly responsible for the placement of Cameo on the suspension of referrals list *and* acted with intentional or reckless disregard of Cameo's right to appeal [as opposed to Cameo's right to a *hearing* prior to] such placement," that therefore Cameo must not have been deprived of a protected interest. However, it is undisputed that Cameo *was* placed on the SOR list without a hearing. The jury did not find, because it was not asked to find, that there was no conspiracy which, as a result of the combined actions of the defendants, resulted in Cameo's wrongful placement on the suspension of referrals list. This Court has previously cautioned against courts of appeal imposing their own views on the meaning of ambiguous jury responses to special verdict questions so as to extinguish causes of action. *Gallick v. Baltimore & Ohio Railway Company*, 372 U.S. 108, 119-120 (1963).

Thus, since the circuit court did not hold that conspiracy alone is sufficient to establish liability under § 1983, there is simply no basis for this Court to exercise its discretion by certiorari on this basis.

III. THE CIRCUIT COURT'S DECISION DID NOT CONFLICT WITH THIS COURT'S PRIOR DECISIONS ON THE QUESTION OF WHETHER CAMEO WAS ENTITLED TO A PREDEPRIVATION HEARING.

The petition for certiorari argues that the decision of the circuit court is in conflict with prior decisions of this Court on the question of whether or not Cameo was entitled to a predeprivation hearing before it was placed on the suspension of referrals list. The petition advances two independent arguments in support of this position.

First, the petition argues that a corporation does not have a recognizable liberty interest so as to trigger the constitutional right of due process. Secondly, the petition argues that the State's interest in the publication of the suspension of referrals list outweighed Cameo's interest in not being placed erroneously on the SOR list, and thus a predeprivation hearing was not required.

A. The Arguments Advanced By The Petitioners Were Not Previously Raised.

Both of the petitioners' above arguments do have one thing in common. Neither of them was raised by the petitioner prior to the filing of the petition for certiorari in this Court. In fact, in arguing that there was no reversible error in the district court's refusal to instruct the jury that Cameo was entitled to a predeprivation hearing, petitioner affirmatively contended before the court of appeals that such an instruction was unnecessary *because it was undisputed that Cameo had not received the hearing to which it was entitled.* (Pet. App. pp. 33-34)

Under this Court's prior holding in *Ellis v. Dixon,* 349 U.S. 458, rehearing denied 350 U.S. 855 (1955), issues not previously raised are not properly reviewable by certiorari. This holding is clearly consistent with the language of Rule 17. For, if the issue was never presented below, there cannot be a circuit court's decision on that issue which would be in conflict with other applicable court rulings.

The petitioners' belated advancement of its "liberty interest" argument is a particularly egregious violation of the *Ellis* rule. For, not only have petitioners not previously raised that issue, but their own proposed jury instructions on the due process question would have allowed the jury to find liability on the basis of the infringement

of Cameo's liberty interest. (Resp. App. 22A-25A) Similarly, the petitioners never requested any jury instruction, nor introduced any evidence, which would have allowed the jury to infer that the State's interest in publication of the SOR list was of such magnitude so as to trigger an exception to the normal predeprivation hearing requirement. Therefore, we believe that it would be inappropriate for the Court to consider these issues for the first time by petition for certiorari.

B. The Circuit Court's Decision Does Not Conflict With This Court's Prior Holdings On Corporate Liberty Interests.

The petition argues that the Seventh Circuit Court of Appeals should have dismissed the complaint, on its own motion, because a corporation does not have a liberty interest protectable by the due process clause, citing two substantive due process cases, *Western Turf Association v. Greenberg,* 204 U.S. 359, 363 (1907) and *Northwestern National Life Insurance Company v. Riggs,* 203 U.S. 243, 255 (1906). The petition fails to cite, however, this Court's much more recent opinion in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978). See also, *Newport v. Fact Concerts, Inc.,* 453 U.S. 247 (1981) in which this Court set aside a punitive damage award against a municipality, but left otherwise standing the judgment in favor of a corporation on the basis that its similar liberty interests had been deprived. *Fact Concerts, Inc. v. City of Newport,* 626 F.2d 1060, 1063 (1st Cir. 1980).

Even assuming that petitioners' liberty interest question was properly presented, the circuit court's decision is not in conflict with applicable rulings of this Court. In order to have a viable argument, petitioners would need to establish two points, that the interest asserted by Cameo is strictly a liberty interest and that the *Western Turf* and

Northwestern National Life cases govern the facts of this case. Petitioners cite no holdings of this Court which limit Cameo's interest involved solely to the concept of a "liberty interest." See, for example, *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), holding that business goodwill is a *property* interest recognizable under the due process clause. Thus, the petition fails to meet even the first prong of the test. The district court in this case specifically found that Cameo's interest in receiving patients was a property, not a liberty, interest under Wisconsin law. (Cross-Pet. App. 2A)

In the *Bellotti* case, this Court held that a corporation had a recognizable liberty interest, under the First and Fourteenth Amendments to the U.S. Constitution, to contribute corporate funds to political campaigns. The Supreme Judicial Court of Massachusetts had upheld a statute barring such contributions in certain circumstances on the grounds that corporations have more limited liberty interests under the Fourteenth Amendment than do natural persons. In reversing that decision, this Court made it clear that it was doing so on the basis of its view of an expanded corporate liberty interest under the Fourteenth Amendment, stating that:

> "Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the *liberty* safeguarded by the Due Process Clause, . . . [a]nd the Court has not identified a separate source for the right when it has been asserted by corporations." 435 U.S. at p. 780. (Emphasis added)

In a subsequent footnote, the Court clearly notes that:

> "It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment. *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394, 30 L.Ed. 118, 6 S. Ct.

1132 (1886); see *Covington & Lexington Turnpike R. Co. v. Sandford,* 164 U.S. 578, 41 L.Ed. 560, 17 S. Ct 198 (1896)." 435 U.S. at p. 720 n. 15.

Thus, even assuming arguendo the applicability of the *Northwestern National Life* and *Western Turf Association* decisions to a *procedural* due process claim, the force of those decisions has been seriously eroded by this Court's more recent opinion in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978).

Justice Rehnquist, in his dissent in *Bellotti,* clearly recognized the effect of that decision on the *Northwestern National Life* line of cases. 435 U.S. at p. 822. However, even under the test proposed by Justice Rehnquist, Cameo's interest in not having referrals suspended is a protected interest under the due process clause.

That proposed test in a functional analysis in which the Court determines which liberty interests are "incidental to the corporations existence," and then affords protection to only those interests. 435 U.S. at pp. 823-824. Here, of course, the right to receive referrals of nursing home patients can hardly be said not to be an interest incidental to a corporation which is chartered and licensed to operate as a nursing home. Thus, Cameo would have a protected liberty interest in remaining off of the SOR list even under the functional-analysis test.

Thus, under the existing state of the law as enumerated by this Court in *Bellotti,* corporations do retain liberty interests protected by the due process clause and Cameo's asserted interest was protected by the due process clause.

Even assuming *arguendo,* however, the continued and undiminished vitality of *Northwestern National Life* and

Western Turf Association, those early decisions do not justify a review of the decision rendered by the Seventh Circuit Court of Appeals in this case. First of all, those decisions were both based upon substantive due process claims which challenged the general regulation of certain business practices by state legislatures. This case, on the other hand, alleges a *procedural* due process claim challenging individualized action by state officials against a specific business corporation. Because of the original reasoning upon which the Supreme Court decided *Northwestern National Life,* the seminal case, this distinction is clearly a determinative one.

In *Northwestern National Life,* an insurance company challenged a Missouri statute of general applicability which precluded insurance companies from raising a specific affirmative defense in defense of a life insurance policy claim. The company alleged, in part, that its right to raise this defense was a liberty interest protected by the Fourteenth Amendment. Justice Harlan, in writing for the majority, analyzed the relationship of the corporation to the state legislature which had adopted the statute. He reasoned that, since the state had created the corporation, and could abolish it altogether, "the state could make such a regulation in relation to its own corporations; for a corporation cannot exert any power, nor make any contract, forbidden by the law of its being." 203 U.S. at p. 254.

In short, the Court based its finding on its perception that, since the corporation only existed by virtue of state law, it could not challenge the will of the state legislature, which was solely responsible for its very existence. The *Western Turf Association v. Greenber* case, also authored

by Justice Harlan, merely adopted, without comment, the holding in *Northwestern National Life.*

The present case, on the other hand, is clearly distinguishable from these two cases. Wisconsin law, the applicable body of law to determine the corporate existence and status here, recognizes a clear distinction between the ability of a "creature of the legislature" to challenge legislative action, and its ability to challenge actions by state officials which are in excess of their statutory authority. Thus, entities created by the legislature are precluded from challenging the constitutionality of a state statute, but they may challenge agency action in excess of the agency's authority. See, for example, *Brown County v. Department of Health and Social Services,* 103 Wis. 2d 37, 307 N.W.2d 247 (1981) and *County of Dane v. Department of Health & Social Services,* 79 Wis. 2d 323, 255 N.W.2d 539 (1977).

Both of those state cases involved a determination of whether or not a county, a municipal corporation which is clearly a creature of the state, and therefore lacking standing to challenge the validity of any state statute, had standing to challenge agency actions which were alleged to be in excess of its authority.

In analyzing the questions presented, the Wisconsin Supreme Court clearly distinguished between those instances where the creature of the state challenged the will of the legislature, and those situations where the claim was not made against the "creator" of the entity involved. In concluding that counties were not precluded from initiating court action to challenge the validity of

state agency action in excess of agency authority, the court concluded that:

> "If administrative agencies may legitimately act only within the bounds of their delegated authority, then to charge an agency with exceeding that authority is not to question the propriety of legislative action but, as we said in *Dane County,* 'to vindicat[e] legislative requirements.' 79 Wis. 2d at 332, 255 N.W.2d, at 539." *Brown County v. Department of Health and Social Services,* 307 N.W.2d at p. 251.

These two earlier decisions by this Court have no applicability to the action here, which challenges agency and official conduct not authorized by the state legislature, rather than challenging the validity of state statutes. Therefore, because the *Northwestern National Life Insurance Company* and *Western Turf Association* cases are clearly distinguishable, and because they have been subsequently modified by the *Bellotti* case, the circuit court's decision is not in conflict with the holdings of this Court. It follows that certiorari would be inappropriate on this basis as well.

C. The Petitioners' Actions Do Not Fall Within The Emergency Exception To The Predeprivation Hearing Requirement.

The petitioners' assertion that a predeprivation hearing was not required, even if that argument had been timely made, would not justify the exercise of certiorari for at least two reasons. First of all, two of the cases of this Court upon which the petitioners primarily rely, *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264 (1981) and *Fahey v. Mallonee,* 332 U.S. 245 (1947), both involved challenges to statutory regulatory schemes on the grounds that these enactments violated

due process on their face. In both cases the legislation challenged provided for temporary summary action if certain standards were met. Prompt postdeprivation hearings were specifically required to be provided within a short time thereafter.

Because both challenges were to statutory enactments, the Court in each case was able to point to a specific legislative determination that the action to be taken was required to be done immediately in order to adequately protect public health or safety. The Court was thus able to review that legislative determination to see if it was rationally supported. The Court determined, in both of those cases, that the legislative concern was rationally based and upheld the facial constitutionality of the laws.

In the present case, on the other hand, the state legislature has made no such determination. In fact, to the extent that the state legislature has made a determination on the need for swift action at all, it makes that determination contrary to the position the petitioners' assert. For, the state statute at issue here clearly provides that parties are not to be placed on the suspension of referrals list until *after* they have received an evidentiary hearing on the propriety of such placement. Thus, there is simply no finding, legislative or otherwise, that a public interest in health or safety existed, and which would have justified departure from the usual rule that a due process hearing is to be accorded *before* the deprivation occurs. See, *Boddie v. Connecticut*, 401 U.S. 371 (1971) and *Logan v. Zimmerman Brush Company, supra.*

This Court has upheld summary deprivations in individual cases only in those special circumstances in which

the statute involved provided for a prompt postdeprivation hearing and where that hearing would provide adequate compensation to the aggrieved party for an erroneous deprivation. *Barry v. Barchi,* 443 U.S. 55 (1979) and *Stoehr v. Wallace,* 255 U.S. 239, 246-247 (1921). Here, of course, the statute provides only for a predeprivation hearing, it does not provide for a postdeprivation hearing at all. No time limits are specified for a postdeprivation hearing on an erroneous placement, and there is no administrative procedure by which the interests destroyed by publication on the SOR list will be adequately compensated. Nor does the availability of state tort remedies satisfy this requirement, *Logan v. Zimmerman Brush Company, supra.* Thus, petitioner's reliance upon the balancing test set forth in *Mathews v. Eldridge,* 424 U.S. 319 (1976) is also misplaced.

The petition therefore fails to state a valid reason for review on this basis as well.

CONCLUSION

For the above reasons, we respectfully submit that the petition for certiorari should be denied.

Dated this 25th day of October, 1984.

Respectfully submitted,

ROBERT M. HESSLINK, JR.
Attorney for Respondent

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APPENDIX
TABLE OF CONTENTS

Page

Memorandum from David Siegel to File re Cameo-Senn, April 18, 1979 (Exhibit 138) 1A

Testimony of Borislav Kresovic, September 13, 1982 (R. 219, pp. 56-57) 2A

Memorandum from David Siegel to File re Session with Senn and Richards, April 18, 1979 (Exhibit 137) 3A

Memorandum from David Siegel to File, May 9, 1979 (Exhibit 150) 4A

Testimony of Thomas Van de Grift, August 2, 1982 (R. 214, pp. 45-47, 52) 7A

Testimony of Louis E. Remily, August 5, 1982 (R. 215, p. 260) 9A

Notice of Placement On The Suspension Of Referrals List, March 19, 1979 (Exhibit 104) 10A

Testimony of Borislav Kresovic, September 13, 1982 (R. 219, p. 65) 12A

Notice of Appeal, Request for Fair Hearing, and Petition for Declaratory Ruling, March 30, 1979 (Exhibit 111) 13A

Bureau of Quality Compliance, Weekly Meeting Minutes, March 30, 1979 (Exhibit 114) 16A

Testimony of Margaret Eiseman, September 17, 1982 (R. 216, pp. 62-63) 16A

Testimony of Peg Smelser, June 17 and 21, 1982 (R. 215, pp. 307-308) 17A

April, 1979 Suspension of Referrals List, April 4, 1979 (Exhibit 121) 18A

Correspondence from Charles J. Fiss, Jr. to Dragomir Kresovic, February 26, 1979 (Exhibit 82) 20A

APPENDIX
TABLE OF CONTENTS—Continued

Suspension of Referrals List, May 2, 1979 (Exhibit 148) 21A

Defendants' Proposed Jury Instruction No. 22 (Liberty; Due Process) (R. 147, pp. 26-27) 22A

Defendants' Proposed Jury Instruction No. 23 (Liberty; Reputation) (R. 147, p. 28) 24A

Defendants' Proposed Jury Instruction No. 25 (Property) (R. 147, p. 31) 24A

Defendants' Proposed Jury Instruction No. 35 (Definition of Proximate Cause) (R. 147, p. 48) 25A

APPENDIX

[Date:] April 18, 1979

[To:] File

[From:] David Siegel
Attorney
Bureau of Quality Compliance

[Subject:] Cameo Convalescent Center—Darla Senn

The Cameo debacle has taken place in the following sequence of events:

1. On September 22, 1978, Robert Hesslink, Attorney for Cameo demanded Darla Senn's survey notes. Mrs. Senn refused to produce those notes.

2. By telephone, I requested that Darla Senn send me the Notices of Violation and a list of all her evidence for each NOV. She sent the NOV's, but refused to send the evidentiary material. Repeated requests to Darla for her information was to no avail.

3. Only upon written directive from Charles Fiss, did Mrs. Senn reluctantly respond with the materials.

4. On October 31, 1978, Mrs. Senn protested our release of her notes and requested "participative withdrawal" from the case. As best as I can tell, "participative withdrawal" is a Roman Catholic birth control technique. Although I didn't know that Mrs. Senn was Catholic, she of course may use whatever method that she feels appropriate.

5. Mrs. Senn continued to be uncooperative and difficult until she was served with a subpoena to produce a tape recording on or about March 1, 1979.

6. Although Mrs. Senn is now cooperative to the extent of preparing the case, she is insistent on trying this case in her own way, and is most difficult to deal with. Her evidence is often flaky and her investigation has proven to be highly inadequate. For example, she asked that I subpoena certain materials to the hear-

ing so that she could find information. It is obvious that the hearing is no time to conduct a survey investigation.

7. Jane Preston, who conducted the verification visit, has considerable disagreement with Mrs. Senn's survey findings, although she is somewhat reluctant to directly contradict her.

DS:kk 754906
cc: Fran Richards
Darla Senn

(Exhibit 138)

———o———

TESTIMONY OF BORISLAV KRESOVIC—DIRECT EXAMINATION BY MR. HANDZEL:

Q. Did you have a conference with Miss Preston regarding the results of her findings during the verification visit?

A. Yes, I did. I had a meeting with her.

Q. Who was present during that conference?

A. For most of the time Mrs. MacDonald was present when she conveyed to us that she found everything corrected except four NOVs that had substantially or acceptable progress of correction and three she marked as uncorrected. She conveyed this to me. I asked her if I may have a copy of her half portion sheet of her verification visit with her comments so that I could convey it to the administrator as to what is not corrected, and Mrs. MacDonald took notes for the other corrected ones or acceptable progress ones. There were a total of seven that she found. Four she marked acceptable progress being made. Three

she marked as uncorrected. The rest were marked as all corrected.

Q. What is your understanding as to what a rating of acceptable progress means?

A. My understanding is that you have almost corrected it or it should be considered a corrected deficiency or NOV.

Q. In addition to advising you of the status of violations during that verification visit, did Mrs. Preston say anything else?

A. Yes.

Q. What did she say?

A. She looked at the NOVs and she said, "Why did she do this to you?"

R. 219, pp. 56-57.

———o———

[Date:] April 18, 1979

[To:] File

[From:] David L. Siegel
Attorney
Bureau of Quality Compliance

[Subject:] Session with Darla Senn and Fran Richards Regarding Cameo Hearing.

On April 16, 1979, Delores Kester and I met with Darla Senn to prepare for the Cameo hearing. The session was once again exasperating because of the difficulty in communicating with Mrs. Senn about the inadequacy of many of her citations.

• • • •

Tickets for this hearing are now available at my desk. Groups of ten or more will receive a 15% discount. Mail

orders will be accepted with a stamped, self-addressed envelope. Tickets will sell for $2.50 per day or $15.00 for the entire hearing. Door prizes will be given to the most imaginative costume worn to hearing. In addition, wager will be taken as to who gets murdered first, on what day, and at what time of day. All are welcome! It should be a gala event!

DLS: to 137267

(Exhibit 137)

———o———

CORRESPONDENCE/MEMORANDUM

STATE OF WISCONSIN

Date: May 9, 1979

To: File

From: David L. Siegel
Attorney
Bureau of Quality Compliance

Subject: Cameo Convalescent Center Hearing

The following is a summary and critique of the Notices of Violation drafted and served by Darla Senn on Cameo Convalescent Center, Inc.

NOV #111728: (Policy on medical direction)—This citation is based on a rather "liberal" interpretation of a rather vague H 32 rule. Since the facility has a book of various policies, it is rather doubtful that we can substantiate that a "policy" on medical direction is explicitily required.

NOV #111729: (Discharge summaries)—If the facility does not bring forth evidence that the missing discharge summaries in fact were in the files, this NOV is rather clear.

NOV #111730: (Thirty days doctor visits)—This citation is well substantiated.

NOV #111801: (Levels of care)—This citation is based on Darla's findings that the level of care box on the PPOC

form had not always been checked. The boxes are presently checked, but they may have been filled in later. Darla did not follow-up with interviews of staff at Cameo.

NOV #111802: (Podiatry documentation)—Although the podiatrist is not charting very well, the selection of rules cited here are inappropriate.

NOV #111804: (Nurses meetings)—I am not sure what we've got here.

NOV #111805: (Staffing deficiency)—Although the facility meets minimum staffing, Darla cited them for insufficient staff because they don't meet their "master staffing plan," which was provided orally to Darla by the Director of Nursing. Darla also contends that the insufficient staff is proven by such "examples" as a nurse call cord which was out of place. This citation is 100% unsupportable because of a wholly inadequate investigation and flaky conclusions of law.

NOV #111806: See 111805.

NOV #111807: (Procedure Manual)—Again, this H 32 rule is vague, and does not specify exactly what must be provided in the way of procedures. I doubt whether a procedure "on proper apparel and dressing a resident" is required as Darla indicates.

NOV #111810: (Rehabilitative nursing—Class "B")—Darla concluded that Cameo lacked a rehabilitative nursing program because of three observations: (1) The fact that approximately one third of the residents in Cameo had a Foley catheter installed; without investigating the specific needs of each of those patients, Darla jumped to the conclusion that not enough was being done to remove these people from catheters; (2) the fact that several patients had been observed as not being turned according to the posted schedules—again Darla did not follow-up her observation to find out any good reason for the positioning of the patients; (3) the fact that several female patients were dressed in clothing that was put on back-

wards. In general, this citation represents a leap of the imagination based on information that warranted further investigation. Unfortunately no further investigation had been conducted.

NOV #111811: (Bed rest without order—Class "B")—Chart review revealed several patients who had been in bed for entire shifts without a doctor's order. I believe this finding warranted further investigation to discover whether there had been good reason for this bed rest. No such investigation had been conducted.

NOV #111817: (Medicine room temperature)—Darla entered the medication room, asked the Director of Nursing what the temperature was, and noted down what the DON told her. At no time did Darla measure the temperature herself. This method of investigation is amateurish and unacceptable, based entirely on heresay [sic] and no substantiation of the accuracy of the thermometer.

NOV #111823: (Inadequate supply of restraints)—Darla observed several residents were restrained with bed linen, rather than commercially manufactured restraints. She then jumped to the conclusion that the facility had an inadequate supply of restraints. It now appears that, in fact, Cameo had plenty of commercial restraints. They simply chose to use bed linen in some instances. Whether use of bed linen as restraints is acceptable or not, citing the facility for an inadequate supply of restraints in [sic] nonsensical.

NOV #111829: (ID sheet lacking minister's name)—Cameo was cited because several patients did not have the name of a clergyman noted on their ID sheets, but only had the name and number of a church. So what?

NOV #111813, 111819, 111820: (Handling of drug orders and profiles by the pharmacist)—Darla telephoned the contracted pharmacy from Cameo and spoke to an unidentified female voice at the pharmacy. Based on her conversation with this anonymous voice, Darla cited several violations. It is bad enough that she did not observe these problems herself. It is wholly incredible that she did not even ask this person what her name was. This "method" of investigation is again amateurish and ludicrous.

The rest of the Notices of violation appear to be more sustainable, as they are based on documented clinical charts maintained by Cameo. However, I fully expect to be surprised by information brought forth at hearing that should have been exchanged at the exit interview or before. Why all this time has to be wasted to do what should have been done six months ago is beyond me.

DLS/jh 651108 (Exhibit 150)

———o———

TESTIMONY OF DEPOSITION OF THOMAS VAN DE GRIFT TAKEN AUGUST 2, 1982—MR. HANDZEL READING FROM QUESTIONS POSTED BY MR. HESSLINK:

* * * *

Q. And, Mr. Siegel ever communicated to you in anyway his belief that a significant number of the Notices of Violation which were issued by Darla Senn in 1978 could not be substantiated?

A. He communicated to me on several occasions that a number—I wouldn't use the word "significant" but a number of the Notices of Violation he had some evidentiary problems with.

Q. When is the first time he communicated to you that there was some problem with the Notices of Violation?

A. I am not certain of the date. It would have to be the end—somewhere around the end of 1978, early part of 1979.

* * * *

Q. Was this one of the things in 1978 or '79 he expressed some concern which would have been consistent with his statement here, "This citation is a hundred percent unsupportable because of a wholly inadequate investigation and flakey conclusions of law" closed quote?

A. Yes.

Q. He expressed that fairly early on in 1979?

A. Yes.

Q. Would it be fair to say that Exhibit No. 150, although you may not have seen that document, is a record of statements, a memo for the file of statements which he probably had properly made to you and others regarding these Notices of Violation?

A. Yes.

Q. What authority did you have at the end of 1978, early part of 1979, when Mr. Siegel was informing as to the problems about a number of these NOVs, what authority did you have yourself to make a decision, to dismiss particular Notices of Violation?

A. None.

Q. Who had the authority to make that decision?

A. Chuck Fiss, or up the ladder up the ladder.

* * * *

Q. Well, did you express a belief in these conversations that one or more of these Notices of Violations were invalid?

A. What I expressed, the nature of our problem with the NOVs that Darla had done an inadequate job of investigating. She had poor investigative techniques and that the fact that she had did not support the violation.

Q. In other words, that there was insufficient evidence to support the violation?

A. Correct.

Q. Did you relay that information to other persons within the Bureau of Quality Compliance prior to June 11, 1979?

A. Yes.

Q. And, you would have relayed information to Mr. Fiss?

A. At some point, yes.

R. 214, pp. 45-47, 52.

———o———

TESTIMONY FROM DEPOSITION OF LOUIS E. REMILY TAKEN AUGUST 5, 1982 BY MR. HANDZEL:

Q. Were you ever advised that many of the violations, Notices of Violation were unsupportable?

A. Yes.

Q. By whom?

A. One of the exhibits was a memorandum from David Siegel to the file which indicated lack of support for a number of violations.

Q. You had seen that memo previously?

A. Yes.

Q. Prior to today?

A. Yes.

Q. When?

A. I would assume shortly after it was written.

R. 215, p. 260.

———o———

NOTICE OF PLACEMENT ON THE SUSPENSION OF REFERRALS LIST

March 19, 1979

Dragomir Kresovic,
Administrator
Cameo Convalescent Center
5790 South 27th Street
Milwaukee, WI 53221

IMPORTANT NOTICE:
READ CAREFULLY
Please note that if you wish to contest placement of your facility on the list by the Department, you must send a hearing request to the Department within the 10-day limit, even if you have already requested a hearing on other issues, such as the violation itself.

Dear Mr. Kresovic:

This is to inform you that, beginning in April, 1979, your nursing home will appear on the Suspension of Referrals List, pursuant to § 50.04(4)(d), Wisconsin Statutes. Your facility's placement on the Suspension of Referrals List is based on the existing violations, enumerated by Notice of Violation serial number, which are listed on page two of this letter.

While your facility is on the Suspension of Referrals List, county agencies are prohibited by law from making referrals to you, under § 50.04(4)(d)(1), Wisconsin Statutes. This restriction takes effect upon publication of the list, and will continue until the department notifies your facility and the county agencies in writing that your facility has been removed from the Suspension of Referrals List.

Your facility is entitiled to contest placement on the list. If you wish to contest this action, as provided in § 50.04(4)(d), you must request a hearing in writing

within ten days of receipt of this notice, by a letter sent to:

Enforcement Section—*Appeals*
1 West Wilson Street, room 421
Madison, Wisconsin 53702

For your own protection, any such appeal should be sent by certified mail.

If you have questions concerning this action by the Department, you may call Enforcement Administration at (608) 266-1258.

Sincerely yours,

/s/ Charles J. Fiss, Jr., Director
Bureau of Quality Compliance

Envelope Postmarked
March 20, 1979
Certified Mail PO 24470016

RECEIVED
March 21, 1979
Cameo Conv. Ctr., Inc.

NOTICE OF PLACEMENT ON THE SUSPENSION OF REFERRAL LIST

Cameo Convalescent Center #2230
March 19, 1979 Page 2

The placement of your facility on the Suspension of Referrals List is based on the following existing violations, enumerated by Notice of Violation serial number:

Violation #	Class	Reason*	Violation #	Class	Reason*
111730	B	2	111807	C	2
111810	B	2	111809	C	3
111811	B	2	111822	C	3
111802	C	3			

*KEY: REASONS FOR COUNTING LISTED VIOLATIONS

1. The plan of correction for this violation has not been timely submitted to the Department.

2. The plan of correction for this violation has been disapproved.

3. The approved (or imposed) plan of correction for this violation has not been carried out.

(Exhibit 104)

———o———

TESTIMONY OF BORISLAV KRESOVIC—DIRECT EXAMINATION BY MR. HANDZEL:

Q. Up to that point in time, April 30, 1979, had you had a hearing on your appeal of the plans of correction?

A. No, sir.

Q. Had you had a hearing on your appeal of the notices of violation?

A. No, sir.

R. 219, p. 65.

———o———

STATE OF WISCONSIN
BEFORE THE WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES

In the Matter of the Petition of CAMEO CONVALESCENT CENTER, INC. Requesting a Fair Hearing Pursuant to §50.04(4) (e), Wis. Stats., and §§ 227.06 and 227.075, Wis. Stats., Involving a Dispute Between Said Petitioner and the Bureau of Quality Compliance, Department of Health and Social Services.	NOTICE OF APPEAL, REQUEST FOR FAIR HEARING, AND PETITION FOR DECLARATORY RULING Case No. DOHE-160-78

The Petitioner, through its attorneys, DeWitt, McAndrews & Sundby, S.C. and Robert M. Hesslink, Jr., by and for its Notice of Appeal, Request for Fair Hearing, and Petition for Declaratory Ruling, alleges as follows:

(1) Petitioner is a corporation organized under the laws of the State of Wisconsin and its principal place of business is 5790 South 27th Street, Milwaukee, Wisconsin 53221, whose principal business is providing shelter and care to the elderly citizens in the general Milwaukee area, and is a nursing home within the meaning of § 50.01(3), Wis. Stats.

(2) The Respondent, Bureau of Quality Compliance, Department of Health and Social Services, is a State agency within the meaning of § 227.01(1), Wis. Stats., and is charged with the authority and responsibility to regulate and inspect nursing homes in accordinance [sic] with Chapter 50, Wis. Stats., and to determine whether or not a

nursing home is to be placed on a suspension of referrals list in accordance with § 50.04(4)(d), Wis. Stats.

(3) On Wednesday, March 21, 1978, the Petitioner was served with a Notice of Placement on the Suspension of Referrals List, by certified mail, and said document was signed by Charles J. Fiss, Jr., Director of the Bureau of Quality Compliance. That notice alleged that Cameo Convalescent Center, Inc. would be placed on the monthly Suspension of Referrals List commencing on April 1, 1979, unless said Petitioner appealed that decision to the Enforcement Section-Appeals, One West Wilson Street, Room 421, Madison, Wisconsin 53702 within ten days of the receipt of said notice. And,

(4) The placement of the Petitioner on the Suspension of Referral List would be illegal, improper and an abuse of discretion.

WHEREFORE, the Petitioner requests the Department to:

(1) Conduct an administrative hearing, as a Class 2 proceeding.

(2) Adjudge the Notice to Place on Suspension of Referral List as illegal, invalid and an abuse of discretion.

(3) Remove any and all traces of said Notice of Placement on Suspension of Referral List on any and all files relating to the Petitioner within the Department or from files of others acting in concert with the Department, and return all copies of the Notice of Placement on Suspension of Referral List to the Petitioner for destruction. And,

(4) Enter an order requesting the Claims Board of the State of Wisconsin to provide payment for any and all

costs, disbursements and reasonble [sic] attorney fees in the necessary and proper defense of this Notice of Placement on Suspension of Referral List and requesting the Board to introduce the necessary legislation to pay said claim.

Respectfully submitted,

DeWitt, McAndrews & Sundby, S.C.

/s/ Robert M. Hesslink, Jr.
Attorneys for Petitioner

VERIFICATION

STATE OF WISCONSIN)
) ss.
County of Dane)

Personally came before me this — day of March, 1979, Robert M. Hesslink, Jr., and stated under oath that he is the attorney for the Petitioner in this action, that he has read the foregoing petition, and that he is personally aware of the facts alleged therein, and that the same is true to the best of his knowledge and belief, except as to matters alleged on information and belief as to which he believes these to be true.

Notary Public, State of Wisconsin
My Commission .....

Received
Bur. of Quality Compliance
Enforcement Section
Nadene R. Dreher 3/30/79
(Handwritten Notation)

(Exhibit 111)

———o———

BUREAU OF QUALITY COMPLIANCE
WEEKLY MEETING MINUTES

March 30, 1979

PRESENT: Chuck Fiss, Tom Van de Grift, Louis Remily, Jan Richardson, Peg Smelser, Milt Stearns, Diane Evensen

* * * *

PEG SMELSER

Suspension of Referrals List

Of the 19 facilities on the list, 6 have not appealed to date.

(Exhibit 114)

* * * *

———o———

TESTIMONY OF MARGARET EISEMAN — DIRECT EXAMINATION BY MR. HESSLINK:

Q. Did you have occasions to observe people checking with Nadene Dreher as to the status of appeals during that first Suspension of Referrals List?

A. Yes.

Q. Did you have occasion to observe Peg Smelser checking on the status of appeals?

A. Yes.

Q. How frequently would she do that that you observed?

A. That I observed personally?

Q. Yes.

A. I—I don't know, at least every other day.

Q. And did you have occasion to observe David Siegel checking the status of appeals that had been filed for that first Suspension of Referrals List?

A. Yes.

Q. How often did you observe Mr. Siegel checking on the status of such appeals?

A. I can't tell you how often. It was of great interest to the staff in the Department and of one—I believe that there was a general and specific knowledge there.

Q. Did you have occasion to observe Mr. Vande Grift checking on the status of appeals?

A. Yes.

Q. And how frequently did you observe him checking on that status?

A. Again, often.

R. 216, pp. 62-63.

———o———

TESTIMONY FROM DEPOSITION OF PEG SMELSER TAKEN JUNE 17 AND 21, 1982—MR. HANDZEL READING QUESTIONS POSED BY MR. HESSLINK:

Q. What other responsibilities, if any, did you have with respect to that list [Suspension of Referrals List]?

A. I would be responsible for the accuracy of the List, for seeing that it was printed and distributed in a timely fashion.

R. 215, pp. 307-308.

———o———

April 4, 1979

April, 1979

SUSPENSION OF REFERRALS LIST

Attached is the April, 1979 Wisconsin nursing home Suspension of Referrals List, published by the Department of Health & Social Services, pursuant to §50.04(4)(d), Wisconsin Statutes. This list remains in effect until the publication of next month's list.

The list is divided into three parts:

I. *SUSPENSION OF ADMISSIONS.* Facilities on this list have outstanding serious or life-threatening violations. These *facilities* are *forbidden,* by law, *to admit any residents* until removed from this list by written notice from the department. In addition, their referral privileges are are [sic] restricted as in #2, below.

II. *SUSPENSION OF REFERRALS.* Facilities on this list have excessive outstanding violations of state codes and/or statutes. County 51.42 Boards, 51.437 Boards, and other county social service agencies *are forbidden,* by law, *to refer anyone* to facilities which are on this list. Other referral groups and agencies are strongly urged to use this list in making choices of facilities for referrals.

III. *REMOVAL OF RESTRICTIONS.* Facilities on this list appeared on List #1 or #2 during the previous month. By correcting violations, they either

a) have their admissions privileges reinstated, but continue to have referrals restricted; or

b) have had all restrictions removed.

In each section of the list, facilities are listed in alphabetical order *by county,* for the ease of those using the list.

In the event that a facility is removed from the *Suspension of Admissions* list during the effective period of this

list, it will receive written notice to that effect from the department.

If you do not wish to continue receiving this list monthly, or if you know of some person or agency who should be receiving this list but is not, please use the form on the back of this letter to notify me. If you have any questions about this list or its use, please contact the Enforcement Administration Section at (608) 266-8847.

Sincerely,

/s/ Charles J. Fiss, Jr., Director
Bureau of Quality Compliance (Emphasis in original)

WISCONSIN DEPARTMENT OF HEALTH & SOCIAL SERVICES SUSPENSIONS LIST
APRIL, 1979

I. SUSPENSION OF ADMISSIONS LIST

Five facilities have appealed placement on the Suspension of Admissions List.

II. SUSPENSION OF REFERRALS LIST

Facilities on this list are prohibited by law from receiving referrals from county social service boards, 51.42 Boards, or 51.437 Boards, until those facilities appear on list III below, the Removal of Restrictions List.

Twelve facilities have appealed placement on the Suspension of Referrals List.

CO./FAC. NAME	CTY./TOWN	LIC#	LIC. NAME
Dane County			
Brickson's Nursing Home	Stoughton	2047	Duane Brickson
Door County			
Door County Mem. Hosp. ECF & N.H.	Sturgeon Bay	2196	Door County Memorial Hosp. Corporation

Milwaukee County		
Cameo Convalescent Center	Milwaukee	2230 Cameo Convalescent Center, Inc.

III. REMOVAL OF RESTRICTIONS LIST

Because this is the first publication of the Suspension of Referrals List, there are no removals from the list to report. However, in future months, facilities listed in this area will be those which appeared on the previous month's suspensions lists and have been removed from one and/or the other of the lists. Those which are designated with an asterick (*) will be those which have had their admissions privileges reinstated, but remain on the Suspension of Referrals List.

(Exhibit 121)

—o—

February 26, 1979

Dr. Dragomir Kresovic, Administrator
Cameo Convalescent Center
5790 South 27th Street
Milwaukee, Wisconsin 53221

Dear Mr. Kresovic:

* * * *

When a facility receives notice that it has been removed from the *Suspension of Admissions List,* it may begin admitting new residents that day. The *Suspension of Referrals List,* however, will be in force from the publication date until publication of the next list, and referral agencies may resume referrals to a facility only when they have received a list indicating that the facility has been removed from the Suspension of Referrals List.

* * * *

Sincerely yours,

/s/ Charles J. Fiss, Jr., Director
Bureau of Quality Compliance

(Exhibit 82)

—o—

May 2, 1979

SUSPENSION OF REFERRALS LIST

Attached is the May, 1979 Wisconsin Nursing Home Suspension of Referrals List, published by the Department of Health and Social Services, pursuant to §50.04(4)(d), Wisconsin Statutes. This list remains in effect until the publication of next month's list.

The list is divided into three parts:

I. *Suspension of Admissions.* Facilities on this list have outstanding serious or life-threatening violations. These facilities are *forbidden,* by law, *to admit any residents* until removed from this list by written notice from the department. In addition, their referral privileges are restricted as in #2, below.

II. *Suspension of Referrals.* Facilities on this list have excessive outstanding violations of state codes and/or statutes. County 51.42 Boards, 51.437 Boards, and other county social service agencies *are forbidden,* by law, *to refer anyone* to facilities which are on this list. Other referral groups and agencies are strongly urged to use this list in making choices of facilities for referrals.

III. *Removal of Restrictions.* Facilities on this list appeared on list #1 or #2 during the previous month. By correcting violations, they either:

a) have their admissions privileges reinstated, but continue to have referrals restricted; or

b) have had all restrictions removed.

In each section of the list, facilities are listed in alphabetical order *by county,* for the ease of those using the list.

In the event that a facility is removed from the *Suspension of Admissions* list during the effective period of this list, it will receive written notice to that effect from the department.

If you do not wish to continue receiving this list monthly, or if you know of some person or agency who should be receiving this list but is not, please use the form on the back of this letter to notify me. If you have any questions about this list or its use, please contact the Enforcement Administration Section at (608) 266-8847.

Sincerely,
/s/ Charles J. Fiss, Jr.

Director
Bureau of Quality Compliance (Emphasis in original)

WISCONSIN DEPARTMENT OF HEALTH & SOCIAL SERVICES SUSPENSIONS LISTS

MAY, 1979

* * * *

III. REMOVAL OF RESTRICTIONS LIST

There are no removals from the list to report. Facilities listed in this area are those which have appeared on the previous month's suspensions list and have been removed from one and/or the other of the lists. Those which are designated with an asterisk (*) are those which have had their admissions privileges reinstated, but remain on the Suspension of Referrals List.

(Exhibit 148)

—o—

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 22 (LIBERTY; DUE PROCESS)

[As stated before,] The Fourteenth Amendment to the Federal Constitution provides that no State shall deprive any person of his liberty without due process of law. The

"liberty" of the individual, which the Federal Constitution thus secures and protects, is not an absolute and unqualified freedom or privilege to do as one pleases at all times and under all circumstances; but is always subject to reasonable restraints, including of course such restraints as are imposed by law.

The plaintiff in this case, in common with the defendants and all other persons living under the protection of our Constitution, had the legal right at all times not to be deprived, without due process of law, of any liberty secured or protected to him by the Constitution or laws of the United States.

To be deprived of liberty "without due process of law" means to be deprived of liberty without authority of the law. Before the jury can determine, then, whether or not the plaintiff was deprived by the defendants of any of his liberty under the Federal Constitution, "without due process of law", the jury must first determine, from a preponderance of the evidence in the case, whether the defendants knowingly did the acts alleged and, if so, whether, under the circumstances shown by the evidence in the case, the defendants acted within or without the bounds of their lawful authority under State law.

For if the defendants acted within the limits of their lawful authority under State law, then the defendants could not have deprived the plaintiff of any liberty "without due process of law", since the Court finds and instructs you that the State law applicable in this case meets the requirements of the Federal Constitution.

Federal Jury Practice and Instructions, Devitt & Blackmar (3rd Ed.) sec. 92.11, with deletions of paragraphs relating to prisoner litigation only.

———o———

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 23 (LIBERTY; REPUTATION)

The plaintiffs complain of injury to their professional and business reputations. The Constitution, however, does not protect against damage to reputation unless the damage to reputation also works to deny the plaintiffs of a right or status previously recognized by state law. In other words, it is not enough for plaintiffs to show their reputations have been injured by the defendants. They must show that the damage to their reputations also altered or extinguished a right or status previously recognized by state law.

The Supreme Court has given three examples of what it means to alter or extinguish a right or status previously recognized by state law. One of the examples is the suspension of a student from school based upon charges of misconduct. Another is the revocation of a driver's license. And a third is the revocation of parole.

Paul v. Davis, 424 U.S. 693 (1976).

Margoles v. Tormey, 643 F.2d 1292 (7th Cir. 1981).

Terket v. Lund, 623 F.2d 29, 31 n. 1 (7th Cir. 1980).

———o———

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 25 (PROPERTY)

Plaintiffs allege that the defendants deprived them of their property without due process of law. In order to make a legal judgment about this claim, you will be asked to answer certain questions.

One of the questions asked is whether one or more of the defendants deprived one or more of the plaintiffs of property. Under the law, property is more than land, automobiles, and other possessions. It includes benefits which state law gives to its citizens.* So in answering whether the plaintiffs were deprived of property, you must consider whether plaintiffs lost some possessions or rights granted by state law.

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*Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972).

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 35 (DEFINITION OF PROXIMATE CAUSE)

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

Federal Jury Practice and Instructions, Devitt & Blackmar (3rd ed.) sec. 80.18.

Office-Supreme Court, U.S.
FILED
NOV 23 1984
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-505

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1984

DONALD E. PERCY, et al.,
Petitioners,
v.
CAMEO CONVALESCENT CENTER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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20pp

TABLE OF CONTENTS
AND
AUTHORITIES

Page

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....2

ARGUMENT.....4

I. The Court Of Appeals' Decision Conflicts With Hudson v. Palmer.....4

II. The Failure To Give A Conspiracy Instruction Was Not Error.....11

III. Cameo Did Not Have A Right To A Prior Hearing....13

CONCLUSION.....17

CASES CITED

Beltran v. Myers,
451 U.S. 625 (1981).....11

Davis v. Scherer,
104 S. Ct. 3012 (1984)....3, 13, 14

Dennis v. Sparks,
449 U.S. 24 (1980).....2, 12

First National Bank of Boston
v. Bellotti,
435 U.S. 765 (1978).....15

Hudson v. Palmer,
104 S. Ct. 3194
(1984).....4, 5, 7, 8, 10, 11

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982).....8, 9

Parratt v. Taylor,
451 U.S. 527 (1981).....7, 9, 10

STATUTES CITED

Section 50.04(4)(e)
Wis. Stats. (1977).....17

No. 84-505

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1984

DONALD E. PERCY, et al.,

Petitioners,

v.

CAMEO CONVALESCENT CENTER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners feel that respondents' statement of the case contains a number of factual errors. For purpose of their

petition, however, and only for that purpose, they accept respondents' statement of facts as true.

SUMMARY OF ARGUMENT

The Court of Appeals' decision conflicts with Hudson v. Palmer, 104 S. Ct. 3194 (1984). Cameo's own description of petitioners' misconduct shows it was random, unauthorized, and in violation of established state procedures. Respondents take no issue with petitioners' assertion that there were suitable state postdeprivation remedies.

The trial court's failure to give a conspiracy instruction was not error because no actor caused a deprivation. Dennis v. Sparks, 449 U.S. 24 (1980), is not to the contrary. The deprivation there was the product of the conspiracy,

and the conspiracy was actionable even though the actor causing the deprivation was immune from liability. But a deprivation there was. Here, the jury found no actor caused a deprivation.

Petitioners have not waived their argument that Cameo was not entitled to a predeprivation hearing. Petitioners were unable to make that argument below because state law required such a hearing. Subsequently this Court ruled that such state law requirements do not divest state actors from their good faith immunity defense, which turns on whether it was clearly established under federal law that a prior hearing was required. At the least, then, this court should grant certiorari to remand for consideration in light of Davis v. Scherer, 104 S. Ct. 3012 (1984).

This Court has not retreated from the rule that corporations do not enjoy fourteenth amendment liberty interests for purposes of due process.

The dispensation from prior hearing requirements does not turn on whether a state legislature did dispense with them but whether it could. In any event, state law provides prompt, postdeprivation administrative hearings.

ARGUMENT

I. The Court Of Appeals' Decision Conflicts With Hudson v. Palmer

Note first that Cameo makes no argument that Wisconsin lacks adequate postdeprivation remedies. The adequacy of Wisconsin's postdeprivation remedies is conceded.

Rather, Cameo argues that petitioners' conduct was not "random and unauthorized" because their misconduct was part of an "officially sanctioned" enforcement procedure. In other words, since petitioners were clothed with color of law garb, the rule of Hudson v. Palmer, 104 S. Ct. 3194 (1984), does not apply.

Certainly it does apply. Cameo's own description of petitioners' conduct portrays lawlessness, defying every known required state procedure at each step of the way. First, Cameo staes that even though state law established SORL eligibility if there were five NOVs, petitioners conspired to place Cameo on the list when there were only three. Second, petitioners conspired to suspend Cameo's right to receive referrals on the basis of NOVs they knew

to be meritless under Wisconsin law. Third, petitioners were required to dismiss the NOVs because they were meritless but prosecuted them anyway. Fourth, petitioners conspired to place Cameo on the SORL despite its appeal, contrary to a state law forbidding such placement in the face of an appeal. Fifth, instead of removing Cameo from the SORL by an appropriate notation on the subsequent SORL, as required by established state procedure, petitioners never did so. Sixth, petitioners never officially removed Cameo from the SORL. Seventh, petitioners gave Cameo only one day to correct a host of NOVs. Eighth, petitioners did not follow Wisconsin law requiring a hearing within thirty days of Cameo's appeal from the NOVs and the POC. Ninth, all

this resulted from Senn's statement that she intended to screw Cameo.

If all those facts are true, as Cameo represents they are, petitioners' conduct was random and unauthorized.

Moreover, Cameo places too much emphasis on the phrase "random and unauthorized." It is enough that the conduct be "unauthorized" under established state procedure. In the verbiage of Parratt v. Taylor, 451 U.S. 527, 543 (1981), it was enough that "the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure." In the verbiage of Hudson v. Palmer, it was enough that the state actors engaged in "an unauthorized intentional" deprivation. 104 S. Ct. at 3204.

And Cameo admits here that the petitioners' "official conduct [was] not authorized by the state legislature." (Resps.' brief in opposition at 24.)

Not only must it be admitted that the alleged conduct was unauthorized, but Cameo's suggestion that it was part of an "official sanction" would repeal Hudson v. Palmer, where the tortious wrongs were done under the cloak of authority. Whether the individual officials themselves are "able to foresee a deprivation is simply of no consequence." Hudson v. Palmer, 104 S. Ct. at 3204.

Nor does this case come within Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). There, the state actor did not timely process an appeal. As a

result the plaintiff's cause of action was extinguished by operation of state law. Distinguishing Parratt v. Taylor, the Court said:

> Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law ... . Unlike the complainant in Parratt, Logan is challenging not the [state actor's] error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.

Logan, 455 U.S. at 436. Here, Cameo does challenge the errors of the state actors and charges them with violating the established state procedures, while conceding that Wisconsin provides suitable postdeprivation remedies. The established procedures do not destroy Cameo's rights. Petitioners' alleged defiance of them works the destruction.

It is the intentionality of petitioners' alleged wrongs that especially triggers Hudson v. Palmer. In explaining why the rationale of Parratt v. Taylor included intentional misconduct, this Court said:

> Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signaling his intent.

Hudson v. Palmer, 104 S. Ct. at 3203. Hence, a conspiratorial intent to deprive by state officials is the antithesis of the established state procedures, by which the availability of due process is measured.

Finally, Cameo states that whether petitioners engaged in random and unauthorized conduct has not been decided. Petitioners will accept this statement as true for purposes of

argument, without waiving their claim that the verdict exonerated them. But accepting the statement as true, petitioners were unable to make the Hudson v. Palmer argument because this Court had not yet decided it.

At best, then, Cameo's argument would warrant this Court to grant certiorari if only to remand to the Seventh Circuit for consideration in light of Hudson v. Palmer. See Beltran v. Myers, 451 U.S. 625 (1981).

II. The Failure To Give A Conspiracy Instruction Was Not Error

Petitioners claim that, because no one caused a deprivation, a conspriracy to deprive is not actionable and the failure to instruct on conspiracy, therefore, was not error.

Cameo now agrees that a conspiracy to deprive is not actionable without a resulting deprivation, but asserts there was a resulting deprivation. The problem with its argument is that the jury found no actor worked a deprivation.

Cameo relies on Dennis v. Sparks, 449 U.S. 24 (1980), to say that an action for conspiracy will lie even if no action lies for a deprivation. That misstates Dennis. At best it held an action for conspiracy lay because the deprivation was the product of the conspiracy, although the actor causing the deprivation could not be sued because of judicial immunity. But there was a deprivation as a result of the conspiracy. Here the jury found no actor, aside from immunity defenses, worked a deprivation.

There being no deprivation by any actor, the failure to instruct on conspiracy was not error. The Seventh Circuit's requirement of an instruction was error.

III. Cameo Did Not Have A Right To A Prior Hearing

Cameo argues that petitioners have waived this argument because it was not submitted below and because they submitted jury instructions allowing the jury to find infringement of a liberty interest.

Cameo is correct that petitioners did not raise this argument below. The reason is that neither they nor the courts below had the benefit of Davis v. Scherer, 104 S. Ct. 3012 (1984), which holds that good faith immunity is not lost for failure to comply with state

rules of procedure. Petitioners' burden at trial was to show that, despite a state rule requiring a prior hearing, they did not deprive because the placement on the SORL without a hearing was a clerical snafu. It is obvious the jury believed petitioners' version. With Davis v. Scherer, however, petitioners are not burdened with showing why they did not comply with state law. Again, at best, Cameo's point in this regard would warrant this Court to grant certiorari and remand for consideration in light of Davis v. Scherer.

Petitioners did submit proposed instructions on liberty interests. However, at that time noncorporate individuals were plaintiffs and Davis v. Scherer had not been decided.

The Court of Appeals rejected the district court's instructions on due process and specifically held that on remand the jury was to be charged that the denial of the state-required hearing was a denial of due process. The Court of Appeals' reformation of the due process instruction is one of the particular issues raised in this petition.

Cameo argues that First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), has eroded this Court's rule that corporations do not have liberty interests protectible by due process. But Bellotti did not reverse this Court's rule that corporations have no liberty interests within due process. It expressly refrained from holding that a corporation has an independent liberty interest, for purposes of the due

process clause, but permitted the corporation to assert the first amendment interests of others. Here the jury found no first amendment retaliation.

Cameo asserts that this Court's rule exempting state action from predeprivation hearings relates to legislative decisions, and that the Wisconsin legislature here has required a prior hearing. Further, it asserts that state law does not provide for a prompt postdeprivation hearing at the administrative level.

The right to dispense with a prior hearing does not turn on whether a state legislature did dispense with it. It turns on whether the state legislature could dispense with it.

State law does provide for a prompt administrative hearing. It must be held within thirty days of the request and the department must make its decision within ten days. Wis. Stats. sec. 50.04(4)(e) (1977). (Pet. app. at 115.)

CONCLUSION

It is respectfully submitted that this Court should grant the petition for a writ of certiorari.

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